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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 365

THE ASSOCIATED PRESS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 436–445) is reported in 85 F. (2d) 56. The findings of fact and order of the National Labor Relations Board (R. 416–433) are reported in 1 N. L. R. B. 788 (1936).

JURISDICTION

The order of the United States Circuit Court of Appeals for the Second Circuit was entered July 20, 1936 (R. 445). The petition for writ of certiorari was filed September 14, 1936, and was granted October 26, 1936 (R. 446). Jurisdiction

of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Act, as here applied to this petitioner, is a valid exercise by Congress of its power to regulate commerce with foreign nations and among the several States.

2. Whether the provisions of Section 8, subdivisions (1) and (3) of the National Labor Relations Act, as applied to this petitioner, are consistent with the Fifth Amendment.

3. Whether the provisions of the National Labor Relations Act as here applied deprive petitioner of the right of trial by jury guaranteed in the Seventh Amendment.

4. Whether the provisions of the National Labor Relations Act as here applied abridge the freedom of the press guaranteed in the First Amendment.

5. Whether petitioner is entitled to question the validity of provisions of the Act other than those here invoked against it, or the application of the Act to persons other than petitioner, and, if so, whether the validity of such provisions or applications is material, because of their separability.

STATUTE INVOLVED

The National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; U. S. C., Sup. I, Title

29, Sec. 151 *et seq.*) is printed in the Appendix, *infra;* pp. 125–143. For the convenience of the Court a summary of the significant provisions of the Act is set forth at this point.

Section 1 of the Act sets forth the facts, as declared by Congress, upon which the legislation is predicated. The basic findings are: (1) "The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce [1] by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of

[1] The term commerce is defined in Section 2 (6) as "trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country."

commerce."[1] (2) "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees." It is then stated to be the policy of the United States to mitigate and eliminate these obstructions to interstate commerce "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing."

The Act does not fix wages, hours, or other conditions of employment. It merely affirms the recognized liberty of employees to associate without interference from employers and to seek to establish their conditions of employment by private bargaining with their employers through representatives

[1] Of the four factual circumstances mentioned by Congress, only (a) and (b) are relevant in this proceeding. Subdivision (c) is relevant in No. 419, *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, and also in Nos. 420, 421, 422, and 423. Subdivision (d) is not involved or relied upon in any of the cases now pending in this Court.

of their own choosing, and protects these rights against interference and coercion of employers as a means of safeguarding interstate and foreign commerce against the burdens of industrial strife.

Section 7 states the basic rights protected by the Act. It declares that "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." To safeguard these rights, Section 8 declares it to be an unfair labor practice for an employer: (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; (2) to dominate or interfere with the formation or administration of any labor organization, or contribute financial or other support to it; (3) to encourage or discourage membership in any labor organization by discrimination in regard to hire or tenure of employment or any term or condition of employment; (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the Act; or (5) to refuse to bargain collectively with the representatives of employees. Of the unfair labor practices set forth in Section 8, only (1), and (3) and (4) are involved in this or any of the other cases now before this Court.

The National Labor Relations Board is empowered by Section 10 (a) to prevent the foregoing un-

fair labor practices under circumstances in which they are found to be "affecting commerce." That phrase is, in turn, defined in Section 2 (7) as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

Section 9 of the Act relates to the selection of representatives for collective bargaining. It provides that representatives selected by a majority of the employees in the appropriate unit shall be the exclusive representative for purposes of collective bargaining, although any individual employee or group of employees may at any time present any grievance to their employer (Sec. 9 (a), (b)). Whenever a question "affecting commerce" arises concerning the representatives of employees, the Board may investigate, hold hearings, or conduct a secret ballot (Sec. 9 (c)). No provision of Section 9 has been applied to petitioner in this case, or to any of the parties in the other cases pending before the Court.

The administrative machinery of the Act is in all substantial respects identical with that of the Federal Trade Commission Act. The Act creates the National Labor Relations Board, composed of three persons appointed by the President by and with the advice and consent of the Senate (Secs. 3–5). The procedural machinery is found in Section 10. Upon the filing of a charge that any person has

engaged or is engaging in an unfair labor practice affecting commerce, the Board is empowered to issue a complaint stating the charges and containing a notice of hearing before the Board or its designated agent. Such person has the right to file an answer and to appear and give testimony at the hearing noticed in the complaint (Sec. 10 (a) and (b)). The testimony taken at the hearing is reduced to writing and filed with the Board. If, upon consideration of all the testimony, the Board is of the opinion that such person has engaged or is engaging in any unfair labor practice affecting commerce, it states its findings of fact and issues an order requiring him to cease and desist from the unfair labor practice and to take such affirmative action as will effectuate the policies of the Act. If upon all the testimony the Board is of the opinion that the person complained against has not engaged and is not engaging in any unfair labor practice affecting commerce, then it states its findings of fact and issues an order dismissing the complaint (Sec. 10 (c)).

The orders of the Board are not self-enforcing, and violation of them carries no penalty. The Board may, however, petition an appropriate Circuit Court of Appeals for the enforcement of its order. The Board then files with that court a transcript of the entire record of the proceedings, including all the testimony and the findings and order of the Board. The court has power to make

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a decree enforcing, modifying, and enforcing as so modified, or setting aside, in whole or in part, the order of the Board. The findings of the Board as to the facts, if supported by evidence, are conclusive (Sec. 10 (e)).

Any person aggrieved by a final order of the Board may likewise obtain a review thereof in the appropriate Circuit Court of Appeals by filing a petition praying that the order be modified or set aside. In such a case the person aggrieved files a transcript of the record and the court proceeds in the same manner and with the same powers of review as in the case of petitions by the Board to enforce its orders (Sec. 10 (f)).

By Section 11 the Board is given certain investigatory powers for the purpose of all hearings and investigations which it deems necessary and proper for the exercise of its powers under Sections 9 and 10.

By Section 6 the Board is authorized to prescribe such rules and regulations as may be necessary to carry out the provisions of the Act. The regulations made and published by the Board are set forth in the record at pp. 281–298. They have subsequently been republished, as amended, in the Federal Register of April 28, 1936, at pp. 321–325. They relate exclusively to the procedural and administrative details of the Board's functions, and no penalty attaches to their violation. No question concerning these regulations is involved in any of the cases now pending.

STATEMENT

In accordance with the procedure outlined above, on November 7, 1935, the American Newspaper Guild, a labor organization (R. 432), filed a charge with the Board (R. 10–11), and the Board, on December 4, 1935, issued a complaint and notice of hearing against the petitioner (R. 12–16). The complaint in outline alleged that petitioner, a membership corporation organized under the laws of New York, was engaged in the purchase, collection, receipt, compilation and formulation of intelligence from within and outside continental United States, and in the sale, distribution, and transmission of the same throughout the United States; that petitioner had engaged in unfair labor practices within the meaning of subsections (1) and (3) of Section 8 by discharging and refusing to reinstate Morris Watson, employed by petitioner in its New York City office in an editorial capacity, because of his membership and activity in the American Newspaper Guild, and that petitioner had thereby engaged in unfair labor practices "affecting commerce" as defined in the Act (R. 12–14).

Petitioner, reserving its constitutional objections, filed an answer to the complaint (R. 16–21). It admitted substantially [1] the allegations relating to the nature of its business, and it admitted that

[1] Petitioner did not admit the allegation that it "sold" the intelligence gathered by it to its "member-subscribers and others."

it had discharged and refused to reinstate Morris Watson but denied that it had so done for the reasons alleged (R. 18).

A hearing was held in New York City on April 7 and 8, 1936, before Charles E. Clark, Dean of the Yale Law School, the trial examiner designated by the Board. Petitioner moved to dismiss the complaint on constitutional grounds (R. 50, 412). The motion was overruled by the trial examiner on all grounds except the issue of interstate commerce (R. 54), and after the introduction of evidence on that point the motion was also dismissed on that issue (R. 182). Counsel for petitioner appeared only specially for purposes of the motion (R. 54). Full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing upon all the issues was afforded to all parties.

On April 23, 1936, the trial examiner filed an intermediate report, finding that petitioner discharged Watson because he joined and assisted the Guild and engaged in concerted activities for the purposes of collective bargaining and other mutual aid and protection, thereby interfering with, restraining and coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act and discouraging membership in the Guild; that Watson and the other editorial employees of petitioner at its New York office were directly engaged in interstate and foreign commerce by facilitating and making possible the flow of news throughout

this and other countries; and that any interference with or cessation of such activities would hamper, impede, and interfere with such commerce and cause a break in the flow of foreign and domestic news which, if not repaired or overcome, would seriously impede, if not prevent, the issuance of newspapers in all parts of the country. The trial examiner concluded that petitioner had engaged in unfair labor practices affecting commerce within the meaning of Section 8, subsections (1) and (3), and Section 2, subsections (6) and (7), of the Act (R. 27–45). He recommended that the Board issue an order requiring petitioner to cease and desist from interfering with, restraining, and coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. He recommended further that Morris Watson be reinstated in his former position and made whole for any loss of pay suffered by reason of his discharge (R. 45).[4]

Petitioner neither complied with nor filed objections to the intermediate report. In accordance

[4] The trial examiner also recommended (R. 44) that petitioner "cease and desist from refusal to bargain collectively" with the American Newspaper Guild. This recommendation was not adopted by the Board because the complaint did not allege any violation of Section 8, subsection (5) (R. 418).

with its Rules and Regulations (Art. II, Sec. 34; R. 289) the Board thereupon proceeded to a decision, and on May 21, 1936, issued its findings of fact (R. 419–432) and order (R. 432–433).

The Board's findings on the merits, with supporting references to the evidence in the record, may be briefly summarized as follows:

Morris Watson has been a newspaper man since 1923, serving on various newspapers before he entered petitioner's employ in 1928, at its Chicago office (R. 183, 184). There he covered important assignments in reporting and rewriting news, and won praise from an official, who, on being transferred to the New York office, secured Watson's transfer there in 1930 (R. 185, 186, 247, 248). At the New York office Watson likewise covered major assignments, was complimented for the excellence of his work, and received an increase in salary (R. 186 *et seq.*, 217, 248; 424–425).

The American Newspaper Guild was organized in 1933 for editorial employees and reporters of press associations and newspapers (R. 258). It is a national labor organization with local guilds in about 70 cities, including New York City (R. 195, 264, 350 *et seq.*, 383 *et seq.*; 423–424). Watson joined the American Newspaper Guild at its inception, in November 1933 (R. 194). He became vice president for wire services, a position he held at the time of his discharge by petitioner; and he assisted in organizing The Associated Press unit, of

which he became chairman (R. 195). He was a very active member in the parent body and in the New York Guild (R. 195–200, 211, 222). Watson was also very active in the Associated Press unit of the Guild (R. 200, 202–203, 229; 425–426, 429).

Throughout the period of Watson's Guild activity, petitioner made clear to him that it disapproved of the Guild, of his activities in its behalf, and of such activity by newspaper employees generally (R. 197, 200, 203, 217, 218; 425, 428). Because of that activity, a foreign assignment was denied him, and on two occasions he was punished by being transferred to work for which he was not suited either by temperament or experience (R. 200, 203, 209–210, 216, 218–223; 425–428). Nevertheless, this and other special work done by him was satisfactory, and in important instances in January and September 1935 was praised by petitioner's general manager, wire editors, or member newspapers (R. 213–214, 224, 226, 227, 228; 427–428).

In July 1934 Watson sponsored and secured the passage by the Guild unit of a resolution for collective bargaining with petitioner, particularly with a view to securing a five-day week instead of the six-day week then in force (R. 200; 425–426). Upon the receipt of a letter signed by the Executive Secretary of the Guild and by Watson, asking for an appointment for this purpose, petitioner's officers induced the members of the Guild unit, over Watson's protest, to suspend the resolution.

Thereupon petitioner granted its editorial employees the five-day week (R. 201–202, 205, 206, 207; 426). On October 7, 1935, petitioner notified the editorial employees that the five-day week was withdrawn and that a six-day week was to be effective at once (R. 228; 429). On October 9 1935, once again Watson sponsored, and the Guild unit passed, a resolution calling upon petitioner to bargain collectively on this subject (R. 229; 429). On October 17, 1935, the Guild wrote petitioner for an opportunity to discuss the matter (R. 230, 347; 429). On October 18, the day on which this communication was received by petitioner, Watson was discharged (R. 233–234; 429–430).

The Board concluded that Watson was discharged and discriminated against in order to discourage membership in the Guild and that petitioner thereby interfered with, restrained and coerced its employees in the exercise of the rights guaranteed to them in Section 7 of the Act (R. 430). Petitioner introduced no evidence to rebut the evidence summarized above, and rested on its contention that the Board was without jurisdiction (R. 430). The Board also made extensive findings on the nature of petitioner's business and the work of editorial employees (*infra*, pp. 29–32, 35–38), and concluded that petitioner had engaged in unfair labor practices affecting commerce within the meaning of Section 8, subsections (1) and (3), and Section 2, subsections (6) and (7) of the Act (R. 419–423, 431).

No error is assigned in this Court respecting any of the Board's findings as to the facts.

Upon the basis of these findings of fact, the Board ordered petitioner, its officers and agents, to cease and desist: (a) from discouraging membership in the American Newspaper Guild or in any other labor organization of its employees, by discharging, threatening to discharge, or refusing to reinstate any of its employees for joining the Guild or any other labor organization of its employees; (b) from in any other manner discriminating against any of its employees in regard to hire or tenure of employment or any term or condition of employment for joining the Guild or any other labor organization of its employees; and (c) from in any other manner interfering with, restraining or coercing its employees in the exercise of their rights as guaranteed in Section 7 of the Act. The Board further directed that petitioner take the following affirmative action, which the Board found would effectuate the policies of the Act: Offer to Morris Watson immediate and full reinstatement to his former position, without prejudice to any rights and privileges previously enjoyed by him; make him whole for any loss of pay he has suffered by reason of his discharge; and post immediately notice to its employees in its New York office stating that petitioner will cease and desist in the manner aforesaid, and keep such notice posted for a period of at least thirty days (R. 432, 433).

Petitioner stated that it would not comply with the order (R. 4). Thereupon the Board, in accordance with the provisions of Section 10 (e), petitioned the United States Circuit Court of Appeals for the Second Circuit for the enforcement of its order (R. 1–4), and filed with the court as required a transcript of the entire record, accompanied by an appropriate certificate of the Secretary of the Board (R. 8–9). The petitioner answered the Board's petition for enforcement (R. 5–7). On July 20, 1936, the court entered an order that the petition of the Board for enforcement of its order be granted (R. 445).

SUMMARY OF ARGUMENT

I

Two factors must be present in order to warrant the issuance of an order under the National Labor Relations Act. (1) The jurisdiction of the Board is limited to the prevention of certain unfair labor practices (Section 8 (1)–(5)) under circumstances in which they are found to be "affecting commerce" (Section 10 (a)) that is "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce" (Section 2 (7)). (2) If jurisdiction exists, there must be proof that the employer has engaged in the practices proscribed by Section 8. The second factor

was clearly proved in the present case, and no error has been assigned with respect to it.

With respect to the first factor, the precise issue here is whether the Board has jurisdiction to apply subsections (1) and (3) of Section 8 to petitioner in its relations with its editorial employees at its New York City office. We submit (A) that petitioner's operations constitute interstate and foreign commerce, and that its editorial employees at its New York City office are in or intimately associated with that commerce; (B) that as applied to interstate enterprises, the provisions of the Act here involved bear a reasonable relation to the safeguarding of commerce from injury or interruption and are consequently proper exercises of the commerce power; and (C) that these provisions of the Act may be properly applied here.

A. The business of petitioner, a world-wide news-gathering and news-transmitting association composed of newspapers or persons representing newspapers, plainly constitutes interstate and foreign commerce. The power of Congress over interstate commerce is sufficient to cope with problems raised by each new form of intercommunication among the States. *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 9–10; *Gibbons* v. *Ogden*, 9 Wheat. 1, 189. Petitioner's business is merely "a special form or instance of interstate communication" (R. 441). Assuming, *arguendo*, that petitioner does not *sell* news, the fact is not

material on the question of Congressional authority. *Caminetti* v. *United States,* 242 U. S. 470; *United States* v. *California,* 297 U. S. 175, 183.

Morris Watson, the employee involved in the present case, was an editorial employee in petitioner's New York City office, and was engaged at various times in the "filing" or "re-writing" of news coming into and going out of that office. We submit that in the light of the facts with respect to the character of this work, and with respect to the integral relationship of the New York office to the whole of petitioner's interstate and foreign system, the Board was correct in finding that the editorial employees at that office were either in, or intimately and directly connected with interstate commerce.

B. The provisions of subsections (1) and (3) of Section 8 bear a reasonable and direct relation to the protection of interstate commerce from industrial strife, and are, consequently, valid exercises of the power of Congress over interstate commerce.

There can be no doubt that industrial strife in interstate enterprises constitutes a burden on interstate commerce with which Congress may deal. This is conclusively demonstrated by *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548; *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 369. This conclusion is not in conflict with the statement in *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 308, that "the relation between employer and employee is a local relation", for

without question Congress may control even local activity when control will assist in removing a burden or injury to commerce. *Schechter Corp.* v. *United States*, 295 U. S. 495, 544.

Nor can there be doubt that subsections (1) and (3) of Section 8 are a reasonable means of eliminating that burden. The decisions of this Court, the investigations of numerous commissions of inquiry, the experience of the Federal Government, and the findings of Congress in this Act (Section 1) are in accord in the conclusion that these provisions will not only eliminate the causes of industrial strife arising from attempts of employees to organize and establish the procedure of collective bargaining, but will also, by affording a basis for amicable adjustment, reduce industrial strife arising out of the substantive terms of the employment contract.

C. We submit, therefore, that subsections (1) and (3) of Section 8 were properly applied to petitioner in this case. Indeed, the decision in *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, seems conclusive, for there is no essential difference between the statutes, the employers, or the employees in that case and the present one. Moreover, apart from that case, industrial strife in petitioner's New York City office would seriously and directly burden interstate commerce, and involve, at least, difficult and expensive rerouting of news, and at most, a paralysis of much of petitioner's system. Furthermore, the work is

carried on at a "throat" of a well-defined "flow" or "stream" of commerce, and is therefore even more clearly within the Federal power to regulate and control. *Stafford* v. *Wallace,* 258 U. S. 495; *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1.

Finally, even if it be admitted, *arguendo,* that editorial employees in the New York office are engaged in some occupation analogous to "production" or "manufacturing", we submit that the Act was properly applied under the principles discussed in the Brief for the Board in No. 419, *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*

II

A. The validity of the order of the Board under the Fifth Amendment is, we submit, settled by *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548. The facts and the statutory provisions there involved, in every respect material to the due process issue, substantially correspond with those of the present case. The cases of *Adair* v. *United States,* 208 U. S. 161, and *Coppage* v. *Kansas,* 236 U. S. 1, upon which petitioner relies, were vigorously urged by the railroad in the *Texas & New Orleans* case, *supra,* and were held inapplicable; consequently they must be equally inapplicable here.

The *Texas & New Orleans* case is not to be distinguished on the ground that the decision there

enforced merely a contempt order, for the Court put its decision squarely on the ground that the Act itself was constitutional. Nor may the case be distinguished on the ground that the Railway Labor Act prohibited interference with representatives only for the purposes of proceedings in arbitration and mediation, for that Act clearly included a distinct prohibition against coercive measures in the choice of representatives and in the exercise by employees of their rights of self-organization for purposes of collective bargaining.

B. Moreover, apart from the *Texas & New Orleans* case as a controlling precedent, the provisions of the present Act here involved are reasonable and consonant with due process. Clearly the procedural machinery of the Act is reasonable and well adapted to achieve its purpose, and likewise, we submit, the prohibition on discriminatory discharges imposes no restriction on the normal exercise of the employer's right to hire and discharge employees. Employees have an unquestioned right to organize for the advancement of their interests; indeed, such organization is a vital necessity. *American Foundries* v. *Tri-City Council*, 257 U. S. 184, 209. This right is destroyed by the unrestricted freedom of an employer to discharge employees because of membership in a labor union or participation in its affairs. Thus the present Act merely safeguards the recognized and essential liberty of employees by a limited restriction on the employer's power of discharge. Similar curtail-

ments of employer's liberty have repeatedly been sustained by this Court. Moreover, the principle upon which this Act is based has not only been developed over a half century of experience, but it is also the established present policy of both Congress and many of the States. Finally, it should be noticed that the Act is, in fact, very limited. It does not compel organization, or the "closed shop." It does not interfere with the employer's normal conduct of his business. It does not fix wages or hours, or provide for compulsory arbitration of labor disputes. And it does not weaken any of the existing laws protecting employers against illegal action of employees or labor organizations. Cf. *Local No. 167* v. *United States,* 291 U. S. 293.

III

That part of the order of the Board which requires petitioner to make Watson, the discharged employee, whole for loss of pay suffered by reason of the discharge does not deprive petitioner of a jury trial in violation of the Seventh Amendment. A similar order was sustained in *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548. Moreover, the Seventh Amendment applies only to rights and remedies as they were generally known and enforced at common law, *Shields* v. *Thomas,* 18 How. 253, 262, and consequently has no application here. *Pennsylvania Federation* v. *Pennsylvania R. Co.,* 267 U. S. 203, 210. The order for back pay is merely a supple-

ment to a decree essentially injunctive in character. Cf. *Clark* v. *Wooster*, 119 U. S. 232.

IV

The order of the Board does not violate the guarantee of the freedom of the press contained in the First Amendment. A valid statute of general application does not become invalid when applied to the press. *Robertson* v. *Baldwin*, 165 U. S. 275, 281; *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U. S. 268. Clearly the present Act does not discriminate against the press, nor constitute a device to limit its freedom under the guise of a regulation of commerce. Nor does it curtail the privilege of petitioner to discharge employees who exhibit actual bias in editing the news. Petitioner is accordingly reduced to the contention that a member of a labor organization must be conclusively presumed to be biased, a proposition which is obviously unsound.

V

The application of the Act to persons other than petitioner, and certain provisions of the Act other than those here applied to petitioner, are not in issue in the present case. Consequently, the validity of the present order is not to be determined by the validity of those other provisions or applications.

A. That no question of constitutional law will be adjudged in advance of the necessity of deciding it

is a salutary principle of constitutional law. *Abrams* v. *Van Schaick*, 293 U. S. 188. For this reason petitioner, who has not been injured by other application or provisions of the statute, is not in a position to question their validity. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 289; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 324-325.

B. In any event, the applications and provisions of the Act to which petitioner objects are clearly separable.

1. The Act is not invalid as applying to all industry and all employees. The jurisdiction of the Board is limited by Section 10 (a) to unfair labor practices "affecting commerce", as defined in Section 2 (7) of the Act. Should the Board err in applying the Act, the courts will correct the error by holding that the order was unauthorized by the Act, not that the Act exceeded the commerce power, for it is clear from the terms of the Act and its legislative history that it was not intended to apply beyond the limits of the commerce power as judicially defined. Finally, it cannot be urged that the Act is invalid because it has been, in practice, applied to all industry. That contention is based upon a complete misapprehension of the facts. We submit, therefore, that unlike the statutes in the *Trade Mark Cases*, 100 U. S. 82, and *Employers' Liability Cases*, 207 U. S. 463, the present Act is applicable on its face only to matters that are within the power of Congress.

2. Nor is the Act invalid because of the alleged invalidity of Section 8 (5). That subsection of Section 8, dealing with the refusal of an employer to bargain collectively, is not "inseparably connected" with the first four subsections. *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 490; *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312–313. Complete support for this position is afforded by *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548. Moreover, it seems clear that Congress would not have intended that the whole Act should fall if Section 8 (5) were to be declared unenforcible. The presumption of separability arising from the separability provision (Section 15) is buttressed not only by the separate listing of the five proscribed labor practices, but also by the fact that a substantial amount of protection of collective bargaining may be obtained by prohibition against interference with organization and free choice of representatives, even if the obligation to bargain may not itself be enforced. The decision in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, is, therefore, not in point here.

ARGUMENT

I

THE APPLICATION OF THE NATIONAL LABOR RELATIONS ACT TO PETITIONER IS A VALID EXERCISE OF THE POWER OF CONGRESS TO REGULATE COMMERCE WITH FOREIGN NATIONS AND AMONG THE SEVERAL STATES

The validity of an order under the National Labor Relations Act depends upon two considera-

tions. First, the jurisdiction of the Board is limited to the prevention of the five specified unfair labor practices under circumstances in which they are found to be "affecting commerce" (Section 10 (a)), that is, "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce" (Sec. 2 (7)). Second, if jurisdiction exists, there must be proof that the employer has restrained or coerced its employees in their exercise of rights affirmed by Section 7 of the Act, by engaging in one or more of the unfair labor practices condemned by Section 8.

This second consideration need not be discussed at length. The Board made detailed findings (R. 423–430) with respect to the unfair labor practices of petitioner (see pp. 12–14, *supra*), and concluded that Morris Watson, the employee here involved, had been discharged under such circumstances as constituted a violation of subsections (1) and (3) of Section 8 of the Act.[8] Petitioner offered no evi-

[8] The evidence clearly shows that Watson was one of petitioner's most able editorial employees (R. 185–189, 217, 247–249); that Watson was very active in securing improved conditions for newspaper workers through the American Newspaper Guild (R. 194, 195–200, 211, 222); and that petitioner repeatedly stated its opposition to the Guild and Watson's activities in this connection (R. 197, 200, 208, 217, 218). Petitioner makes much of the fact that it retained Watson in its employ for two years while his Guild activity was well known, and that other Guild members are still employed (Br. pp. 91–92). But the evidence shows that petitioner per-

dence on the question, and it does not attack the findings as without support in the evidence—the only basis upon which they may be overthrown. *Florida* v. *United States*, 292 U. S. 1, 12; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73; *Texas & New Orleans Ry. Co.* v. *Brother-*

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sistently sought to persuade and coerce Watson to refrain from such activity during this period, by flattery (R. 217), by offers of advancement (R. 197, 203–204, 216, 217), and by transfers to unpleasant and unsuitable work (R. 209–210, 216, 218–223). The inference from all the evidence is plain that petitioner discharged Watson when it did because he was largely responsible for the renewed efforts by the Guild unit to bring about collective bargaining with petitioner on the issue of the five day week, which had been withdrawn by petitioner without notice (R. 228–230, 233–234, 347). He was discharged on the day petitioner received a communication from the Guild requesting a conference for the purpose of negotiation on this issue (*Ibid*). On a similar occasion the previous year, petitioner had taken other effective steps to persuade and coerce the Guild membership to refrain from designating representatives for collective bargaining on this issue (R. 200–209).

In order to discourage and stamp out the collective activity of its employees, it was not necessary for petitioner to discharge every Guild member. Watson was the Guild's vice-president for wire services, was an organizer and the original chairman of the Associated Press unit, and was the vital, aggressive force in the unit. Petitioner's campaign in opposition to the Guild, including the discharge of Watson, was intended and for a time had the actual effect of discouraging Guild membership and activity among the editorial employees (R. 202, 234, 243, 426, 430).

Petitioner's suggestion that the quality of Watson's work had fallen below his own standard of capability (Br. p. 91) is utterly groundless, and is refuted by the important special assignments given and satisfactorily completed by him during 1935 (R. 213–214, 224–228, 427–428).

hood of Railway Clerks, 281 U. S. 548; *Pick Mfg. Co.* v. *General Motors Co.*, 299 U. S. 3. No error is assigned in this Court respecting any issue on this phase of the case.

There remains only the first issue, that of jurisdiction. The precise question is whether the Board, and the court below, erred in applying Section 8, subsections (1) and (3) of the Act to the petitioner in its relations with its editorial employees at its New York office. Petitioner argues that the Act is under no circumstances a valid exercise of the commerce power, and that in any event it may not validly be applied to petitioner's editorial employees who, on petitioner's theory, are engaged in operations analogous to production or manufacturing (Br. pp. 19 *et seq.*). With respect to the issue of jurisdiction, we will show: (A) that petitioner's operations constitute interstate and foreign commerce, and that the work of the editorial employees is in or intimately associated with that commerce; (B) that as applied to interstate enterprises, the protection of the rights of employees affirmed in Section 7 of the Act by the prevention of the unfair labor practices set forth in Section 8, subsections (1) and (3), bears a reasonable and direct relation to the safeguarding of interstate commerce against interruption and injury due to industrial strife, and consequently is a proper exercise of the commerce power; and (C) that those provisions of the Act may validly be applied under the circumstances of this case.

A. *Petitioner's Operations Constitute Interstate and Foreign Commerce and the Editorial Employees Here Involved Are In or Intimately and Directly Associated With Such Commerce*

1. The Nature of Petitioner's Operations

The Board's findings as to the character of petitioner's extensive interstate and foreign operations (R. 419–421) are based principally upon testimony of one of petitioner's officers and certain documents and publications of petitioner. No error has been assigned in this Court respecting any of these findings. Briefly, these findings, supported by references to the evidence in the record, are as follows:

The Associated Press is a membership corporation organized under the laws of the State of New York (308, 419). It is a cooperative association of newspapers or persons representing newspapers. It gathers information and intelligence from its members and from other sources in all parts of the United States and in foreign countries, and distributes the information so gathered to its members (R. 309). There are at present about 1,350 members, including 1,200 daily newspapers in the United States, practically all of which operate for profit (R. 56, 171, 308–309; 419–420).

The principal office of petitioner is in New York City (R. 61). However, it has its own representatives in important capitals and cities in the United States and in other parts of the world (R. 62, 140,

309; 420; Bd. Exh. 4, pp. 3–19). An affiliate, The Associated Press of Great Britain, with a branch office in Paris, obtains pictures of news events abroad to be supplied to petitioner (R. 57). Petitioner has another affiliate located in Berlin (R. 57), and has reciprocal arrangements with important news agencies in foreign countries for the interchange of news: with Reuter (R. 97), the Canadian Press (modeled after petitioner) (R. 70, 71) and Domei-Tsuchin-Sha, a Japanese news bureau (R. 163).

Petitioner has division points throughout the United States, each of which is responsible for the collection of news from its territory and for its distribution. These divisions are the Eastern, with headquarters in New York City; the Southern—Atlanta, Georgia; the Central—Chicago, Illinois; the Western—San Francisco, California; and the Southwestern—Kansas City, Missouri. Each division has regional offices and member newspapers reporting to it. (R. 106–110; 420; Bd. Exh. 4.) In addition, petitioner has a special bureau at Washington, D. C., and a Foreign Service, operating from its New York City office, with offices, staffs, and correspondents in Africa, Asia, Europe, and Central and South America (R. 64, 66, 88; 420; Bd. Exh. 4). The control of news is extremely decentralized or "broken-down" (R. 64 *et seq.*, 75, 85, 86, 140; 420). Each collecting unit—regional office, division point, member newspaper—determines the value to other regions, divisions, etc., of

each item of news collected by or coming to it and sends each item along to other points or distributes it according to its judgment of the item's interest (R. 85, 86, 88, 89, 94, 140; 420–421). Consequently, the individual editorial employee, no matter where he may be situated, has a measure of responsibility for the effective functioning of the entire system (R. 421).

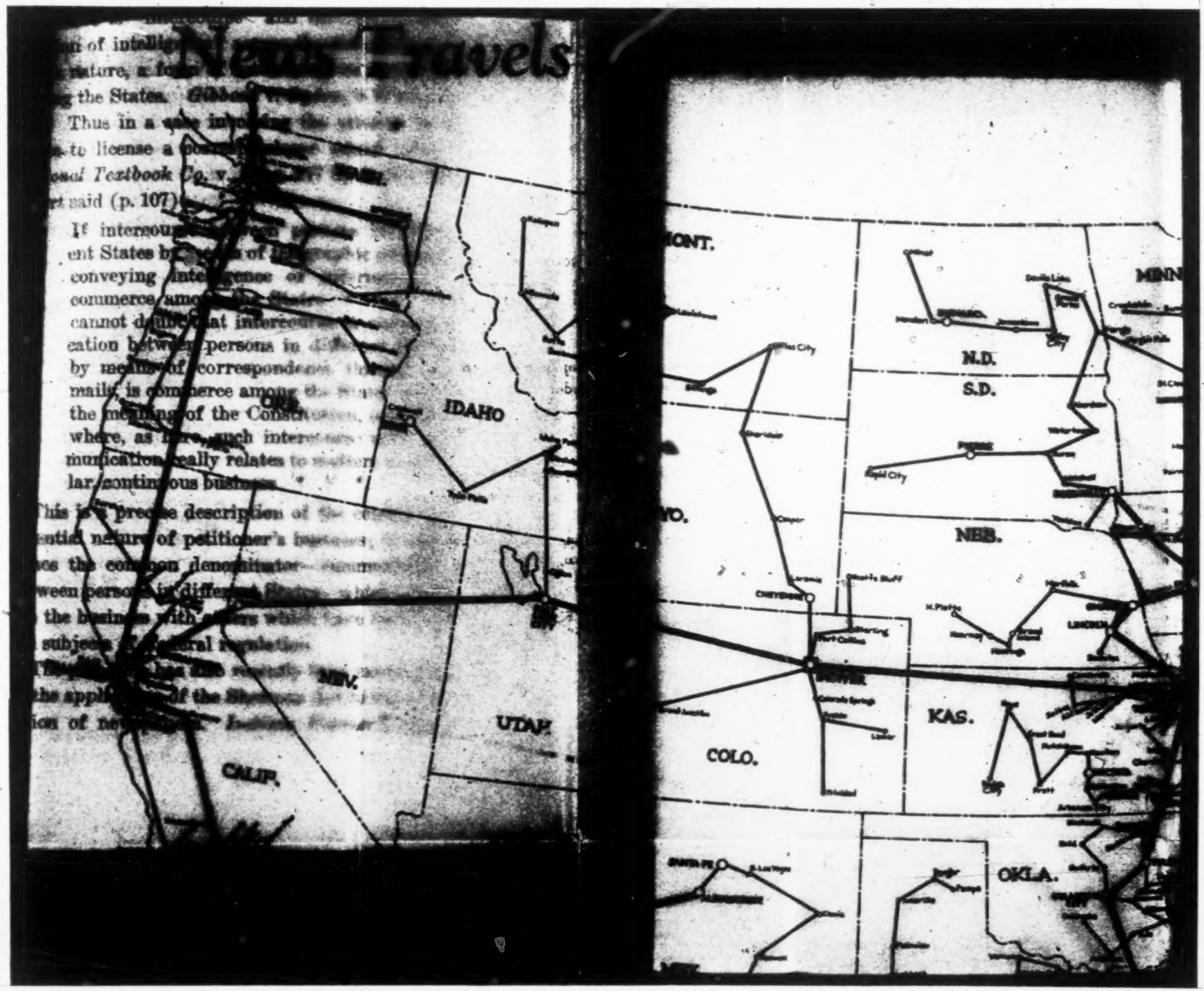
The usual method of communication is by "leased wires" (*i. e.*, special service by contract with the Western Union Telegraph Company, the American Telephone & Telegraph Company, and the Pacific Telephone & Telegraph Company), although all forms of communication—telephone, messenger, wireless, mail—are utilized (R. 91 *et seq.*, 96; 421; Bd. Exh. 4). From each division point there stretches out to the East, the West, the North and the South, trunk telegraph wires which are the principal intake and feeding lines for the division and which provide interdivisional communication. Subsidiary regional circuits tie into these primary circuits (R. 88, 93–95, 105–107, 109 *et seq.*; 421). There is thus a continuous and constant interchange of news among the various members of the Associated Press (described at R. 88–95), requiring 24-hour coverage in three shifts of editorial employees at division points such as New York (R. 69; 422). The "number of words daily received and transmitted at each of the more important offices is over 200,000 or the equivalent of 125 columns of the average newspaper" (R. 101;

420). Petitioner has a registered trade-mark which it declares is used by it "in commerce among the several states of the United States" (R. 341).

The attached map, recently published by petitioner as an advertisement (*Editor and Publisher*, Apr. 25, 1936, pp. 106–107), illustrates the data in the record concerning petitioner's transcontinental wire system.

This business plainly constitutes interstate and foreign commerce. In upholding the existence of a power in Congress to regulate the telegraph companies, this Court has stated that the power to regulate interstate commerce is sufficient to cope with the problems raised by each new form of intercommunication and commerce among the States. *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 9–10. See also *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105. This principle has recently supported Federal regulation of radio communication. *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 279. Cf. *Fisher's Blend Station* v. *Tax Commission*, 297 U. S. 650, 654.

It seems beyond doubt that the business of petitioner, "which merely is a special form or instance of interstate communication", as the court below stated (R. 441), is as much a subject of appropriate Federal regulation as is communication in general. Indeed this Court has made it clear that there is nothing special or peculiar in the standard communication businesses. Their inclusion in the


News Travels
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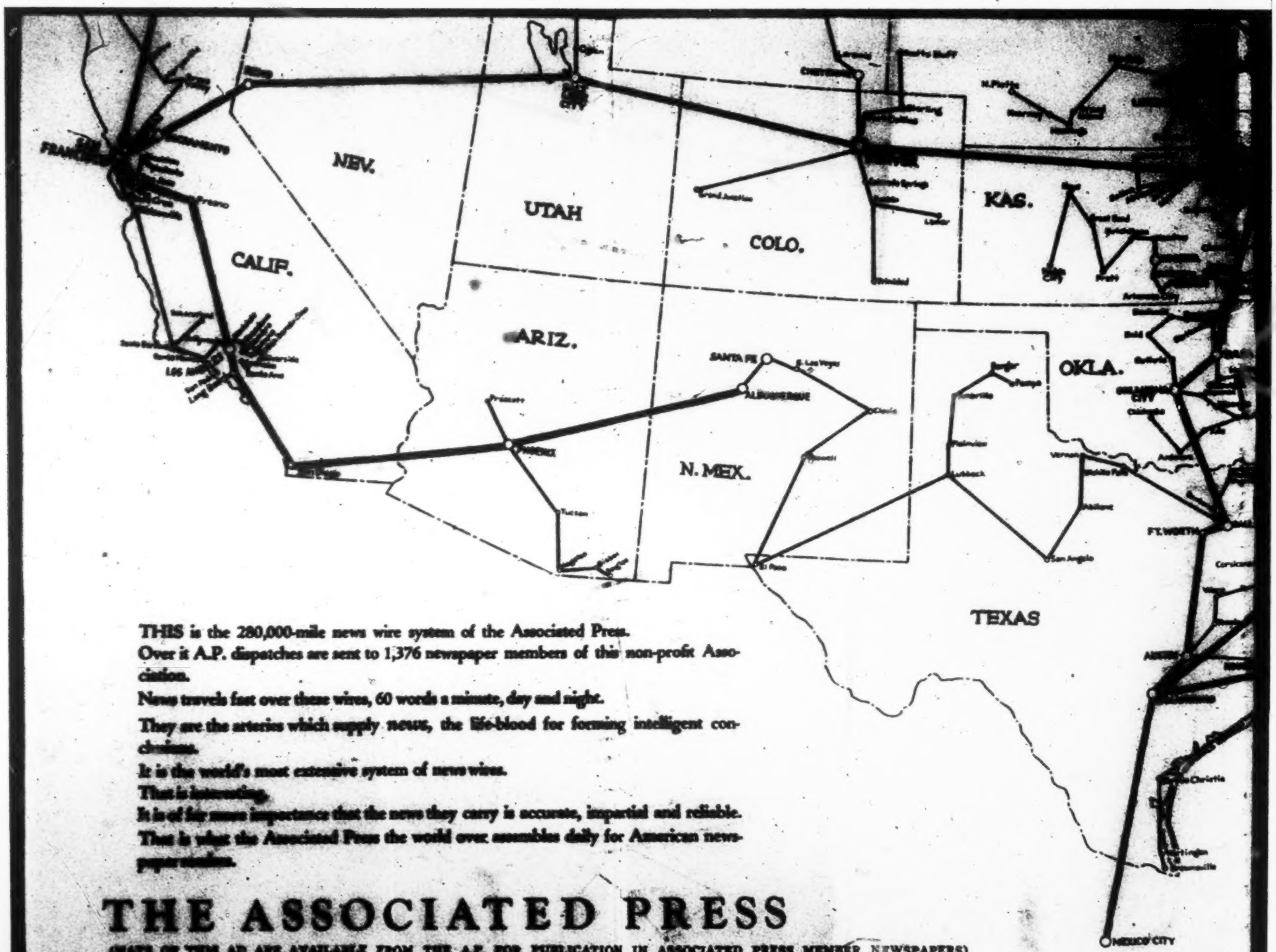


THIS is the 280,000-mile news wire system of the Associated Press.

Over it A.P. dispatches are sent to 1,376 newspaper members of this non-profit Association.

News travels fast over these wires, 60 words a minute, day and night.

They are the arteries which supply news, the life-blood for forming intelligent conclusions.

It is the world's most extensive system of news wires.

That is interesting.

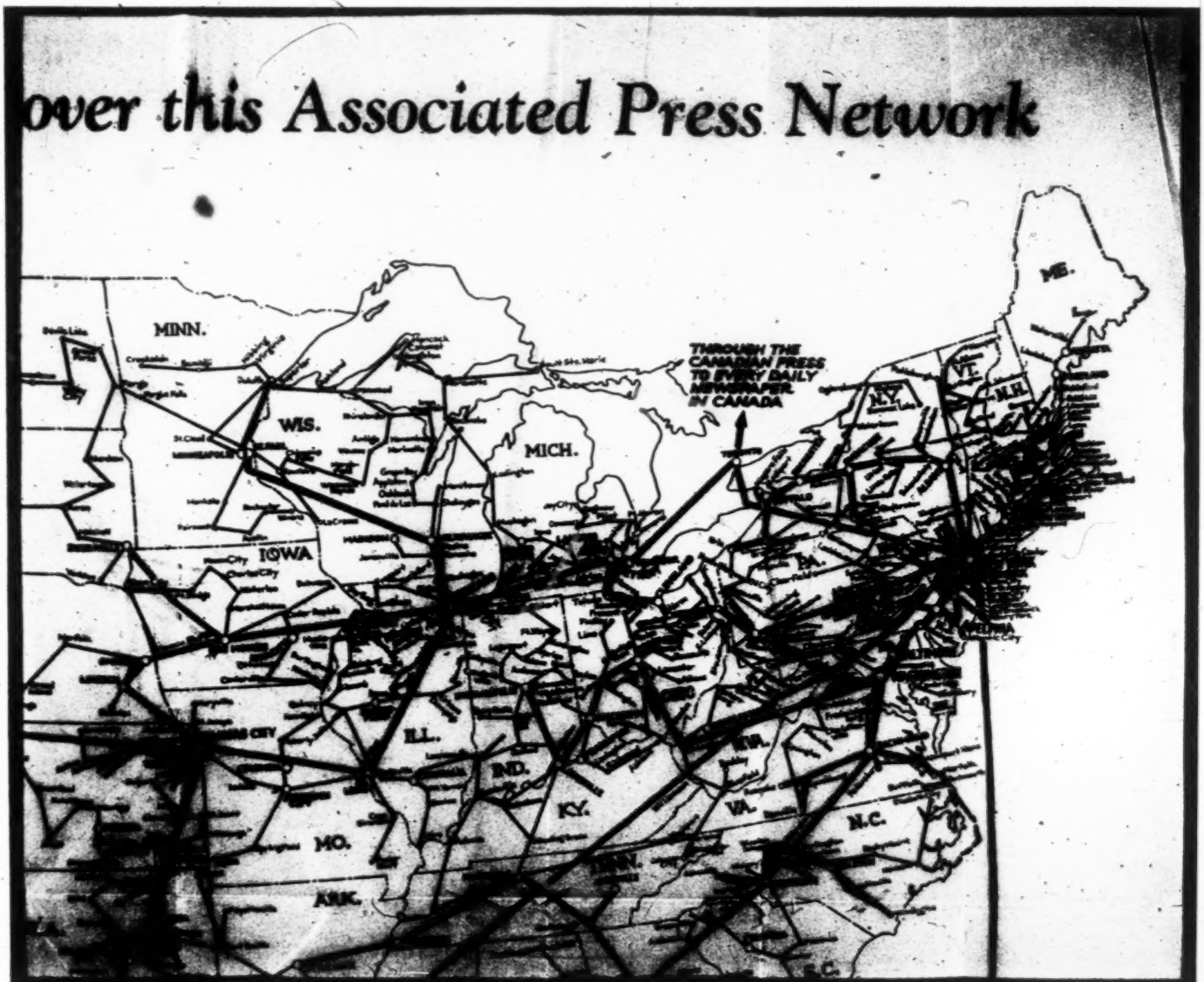
It is of far more importance that the news they carry is accurate, impartial and reliable.

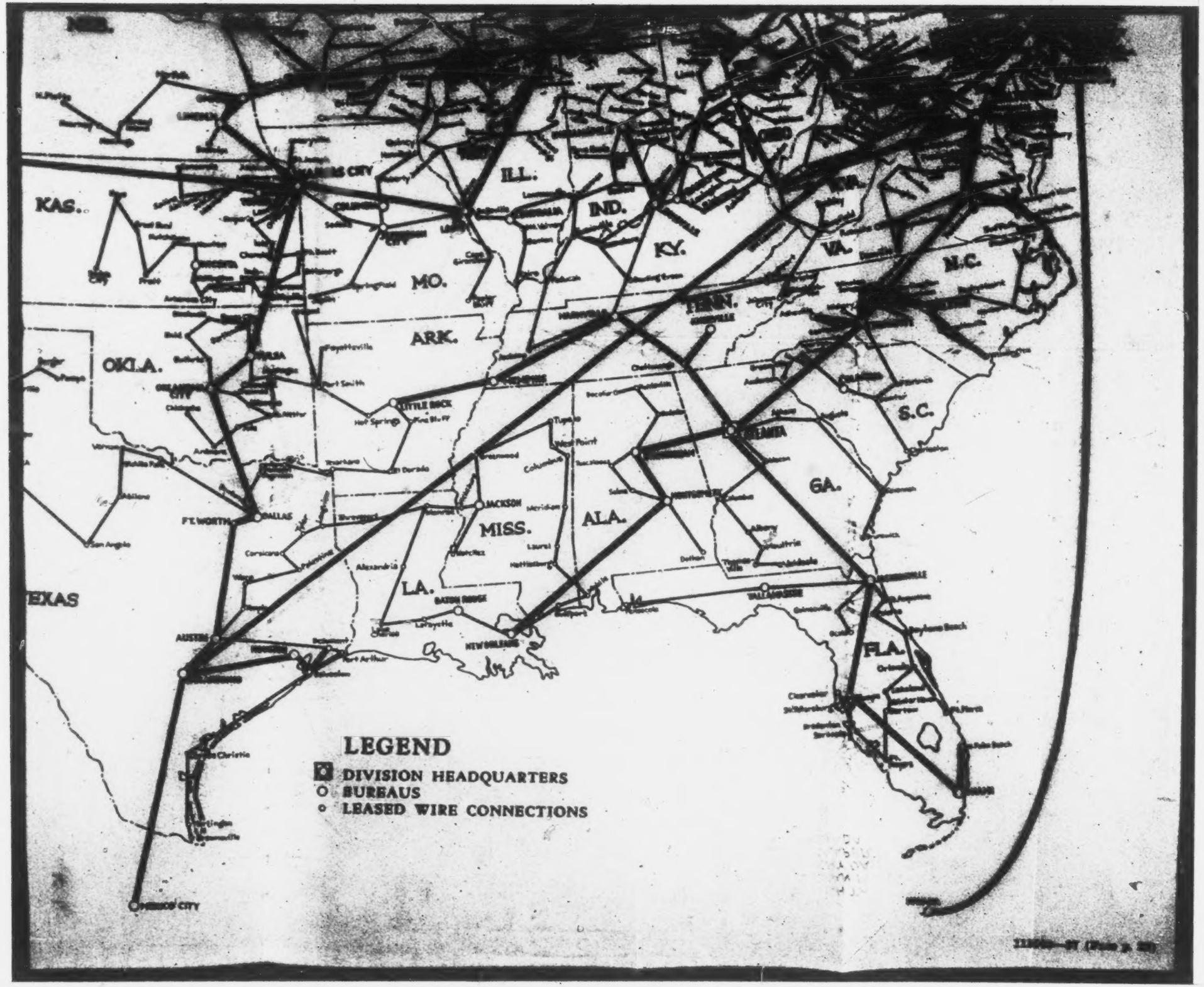
That is what the Associated Press the world over assembles daily for American newspaper readers.

THE ASSOCIATED PRESS

(MATS OF THIS AD ARE AVAILABLE FROM THE A.P. FOR PUBLICATION IN ASSOCIATED PRESS MEMBER NEWSPAPERS)

over this Associated Press Network

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LEGEND
DIVISION HEADQUARTERS
BUREAUS
LEASED WIRE CONNECTIONS

concept of commerce is based on the broad principle laid down by Chief Justice Marshall, that commerce is "intercourse", and that the "transmission of intelligence" across the state lines, is, in its nature, a form of intercourse or commerce among the States. *Gibbons* v. *Ogden*, 9 Wheat. 1, 189. Thus in a case involving the attempt by a State to license a correspondence school (*International Textbook Co.* v. *Pigg*, 217 U. S. 91) this Court said (p. 107):

> If intercourse between persons in different States by means of telegraphic messages conveying intelligence or information is commerce among the States * * * we cannot doubt that intercourse or communication between persons in different States, by means of correspondence through the mails, is commerce among the States within the meaning of the Constitution, especially where, as here, such intercourse and communication really relates to matters of regular, continuous business * * *.

This is a precise description of the central and essential nature of petitioner's business; it establishes the common denominator—communication between persons in different States—which identifies the business with others which have been held the subjects of Federal regulation.

The principle has also recently been exemplified in the application of the Sherman Act to the circulation of newspapers. *Indiana Farmer's Guide*

Publishing Co. v. *Prairie Farmer Publishing Co.*, 293 U. S. 268, 276. The business of petitioner is much more intimately a matter of interstate commerce than the operation of the farm journals which were the subject of that case. Petitioner has itself emphasized (R. 309), and a sampling of leading newspapers confirms (Guild Exhibits 1–10, incl.; R. 431), that a press service is "essential to the conducting of modern daily newspapers." Petitioner performs for more than half the daily newspapers throughout the United States, as its special function, the vital operations of interstate and foreign collection and dissemination of news (supra, p. 29). Petitioner claims to be "the greatest clearing house for news in the world" (Bd. Exh. 4, p. 1), and is substantially larger than competing press services in the United States.*

* Of approximately 2,000 daily newspapers in the United States, only 164, with an average circulation of less than 3,000 and a combined circulation of slightly over 1 per cent of the total, do not use any press service. Petitioner numbers among its membership approximately 60 per cent of all daily newspapers. More important, its members have a combined circulation of about 80 per cent of the total. About 40 per cent of the country's daily newspapers use petitioner's service exclusively. Approximately 30 per cent use exclusively some press service other than petitioner, and this business is divided chiefly among three of petitioner's competitors, United Press, International News Service, and Universal Service. Of the 463 dailies using more than one press service—typically those in the more populous areas and having comparatively larger circulations—all but 51 are members of petitioner. (Compiled from data as of September 30, 1935, published in *Editor and Publisher*, Jan. 25, 1936, p. 14 *et seq.*)

Petitioner contends that it is not engaged in *selling* news and does not make a profit. These characteristics are not material on the question of Congressional authority over petitioner under the commerce clause. Cf. *Caminetti* v. *United States*, 242 U. S. 470; *United States* v. *Hill*, 248 U. S. 420; *United States* v. *Simpson*, 252 U. S. 465; *United States* v. *California*, 297 U. S. 175, 183. It is interesting to note, however, that in a case in which petitioner was granted protection of a court of equity against the unfair competition of a competing news agency, this Court described the business in terms wholly inconsistent with a non-commercial conception, stating that petitioner and its competitor, the International News Service, "are competitors in the gathering and distribution of news and its publication for profit in newspapers throughout the United States." *International News Service* v. *The Associated Press*, 248 U. S. 215, 229. See also R. 309, 316. Moreover, it is wholly immaterial that the "title" to the news may remain in petitioner during its interstate transmission. *The Pipe Line Cases*, 234 U. S. 548, 560; *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23, 28.

2. The Work of the Editorial Employees of Petitioner Is In, or Intimately and Directly Connected With, Petitioner's Interstate and Foreign Commerce

Morris Watson, who was found to have been discharged under circumstances constituting unfair labor practices under the Act, was an edi-

torial employee in petitioner's New York City office. He was engaged at various times in the "filing" of outgoing news[1] (R. 191, 209; 427), and in the revision or "re-writing" prior to distribution of news coming in over the wires (R. 214, 224; 424). At the time of his discharge he was engaged in the latter activity (R. 224; 428). The Board found that the work of the editorial employees is carried on in the course and current of interstate and foreign commerce, is an integral part of the operations of instrumentalities of such commerce, and facilitates and makes possible the flow of news from place to place throughout this country and other countries (R. 423, 431).

The record fully supports these findings. New York City is the principal office of petitioner (R. 61; 420). This office is the headquarters of the eastern division, and through it also is operated a Foreign Service, with offices, staffs, and correspondents abroad (R. 64, 66, 88; 421). Practically all news from Europe passes through this office (*Ibid*). As news is received at the New York City office over the world-wide communication system described above, it is edited by editorial

[1] An employee engaged in "filing" has charge of a wire serving a particular section of the country. He receives copy from other wires or from the various desks where it has been rewritten, edits the copy according to the interest of his particular circuit and hands it to an operator for transmission. In the case of an important dispatch, the entire operation may not take more than one or two minutes (R. 191, 193, 423). See further, *infra*, pp. 37–38.

employees under the direction of supervising editors and transmitted throughout the division and to the headquarters of other divisions to the extent warranted by the news (R. 88, 90; 422). The New York City office thus receives and dispatches news from and to all parts of the world in addition to the news from the Northeastern and Middle Atlantic States. Much of the material passing through the editorial staff in the New York City office receives little or no treatment at all, such as wire photos (R. 60–61, 126) and news which has been edited and digested at other division points (R. 85). Even when there is comparatively more editorial treatment of the news items, that which leaves the office is fundamentally that which came into it (R. 68).

The editorial employees in the New York City office, of whom Morris Watson was one, receive, rewrite, and file for transmission the news coming into and going out of the office. It is this editorial staff that keeps the flow of news moving. These employees, however, do not conduct the mechanical operations of the transmission of the news. This is done by the Traffic Department (R. 83; 423). An executive news editor, assisted by supervising editors and editorial employees, has general charge of the revision of the news as it is received from the filing editors in immediate charge of the wires to and from various places. The filing editors supervise the news as it goes out on trunk or primary circuits and the secondary wires from New York City. Such editors determine what news, from the

vast amount of copy delivered to them, is to be sent on their respective wires; they supervise its rewriting as they determine to be desirable for the uses of their respective circuits, and its delivery to teletypewriter operators for transmission over such wires (R. 84, 111, 119, 191; 422).

The editors and editorial employees must be able to determine the news value of items and to rewrite copy with speed and the utmost accuracy, so that in the case of important news all the work on a particular item may be completed within a few minutes (R. 67, 68, 69, 70, 101; 422). Thus a story from abroad may be received, rewritten, and sent out over the wires in from 12 to 20 minutes, and an unusually important item, such as the death of the King of England, would be sent out in half that time (R. 68; 422). Leads of from 2 to 15 minutes in the transmission of important news reports have been sufficient to constitute news "beats" (R. 192). Less important news is handled in a more leisurely way, but all news is perishable and becomes valueless for the purposes of petitioner as soon as it becomes generally known through competing press agencies or otherwise (R. 147, 148, 310; 423).

The court below found that the work of Watson and of the other editorial employees is an important factor in petitioner's system of interstate and foreign intercourse and that "the editing of a message in interstate commerce is not a break in continuity equivalent to manufacturing a finished

product from raw materials" (R. 444). The editorial employees referred to are engaged "in or about commerce", or in direct connection with the flow of commerce; they are not manufacturing employees engaged "exclusively in producing a commodity." *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 305, 308. As petitioner's official put it, "basically, the Associated Press is an exchange of news system. It is incoming and outgoing, incoming and outgoing, day in and out" (R. 88). The work done upon the news by the editorial employees is an important, and indeed an integral and indivisible part of the function of petitioner's world-wide enterprise for the collection and transmission of news. To say that "the analogy is exact between these employees and the employees of a manufacturing plant engaged in transforming the raw materials into a finished article" (Pet. Br. p. 45) is to distort the long accepted sense of those words and invokes an analogy entirely unfitted to a business which describes itself as devoted to the accurate, impartial, and speedy gathering, exchange, and transmission of news (R. 308–309).

B. Subsections (1) and (3) of Section 8 of the Act, As Applied to Interstate Enterprises, Bear a Reasonable and Direct Relation to the Protection of Interstate Commerce from the Burden of Industrial Strife, and Consequently Are a Valid Exercise of the Commerce Power

In view of petitioner's contention that the National Labor Relations Act is under no circumstances a valid exercise of the commerce power, we consider that question before passing to the validity of the Act's application under the circumstances of this case.

The basic validity of the Act presents two problems. First, does industrial strife in interstate enterprises constitute a burden on interstate commerce which Congress may remove or prevent? Second, does the present Act invoke appropriate means for the mitigation or elimination of that burden?

1. Industrial Strife in Interstate Enterprises Constitutes a Burden on Interstate Commerce Which Congress May Remove or Prevent

That industrial disputes in an industry or business engaged in interstate commerce may and very frequently do burden and interrupt the flow of such commerce is a fact of common knowledge. A strike or lockout ordinarily means a complete or partial suspension of business. That such an effect is so direct and substantial as to be within the scope of Congressional power has been

settled by *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, where this Court in a unanimous opinion upheld Section 2, third of the Railway Labor Act of 1926, which prohibited interference with the self-organization of employees and their free choice of representatives for collective action. The Court said (p. 570):

> We entertain no doubt of the constitutional authority of Congress to enact the prohibition. The power to regulate commerce is the power to enact "all appropriate legislation" for its "protection and advancement" (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures "to promote its growth and insure its safety" (*County of Mobile* v. *Kimball*, 102 U. S. 691, 696, 697); to "foster, protect, control and restrain" (*Second Employers Liability Cases*, 223 U. S. 1, 47). Exercising this authority, Congress may facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation.

The Railway Labor Act was thus upheld by this Court "upon the express ground that to facilitate the amicable settlement of disputes which threatened the service of the necessary agencies of interstate transportation tended to prevent interruptions of service and was therefore within the delegated power of regulation." *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 369. It is apparent that in like fashion industrial strife threatening the operation of various other forms

of commercial intercourse among the States, such as motor and water transportation, pipe lines, freight agency services, and communication by wireless, telephone, telegraph or radio, would directly affect interstate commerce and hence fall within Congressional power to mitigate or eliminate. See *Bradley Lumber Co.* v. *National Labor Relations Board,* 84 F. (2d) 97, 99 (C. C. A. 5th), certiorari denied, October 12, 1936, No. 153; *National Labor Relations Board* v. *National N. Y. Packing Co.,* 86 F. (2d) 98 (C. C. A. 2d); *Agwilines, Inc.* v. *National Labor Relations Board,* decided December 22, 1936 (C. C. A. 5th).

Petitioner's contention that the principle of the *Texas & New Orleans* case is limited to instrumentalities of commerce (Br. pp. 56–57) cannot stand. Such instrumentalities are not the only form of interstate commerce, and cases under the Sherman Act make clear that the Federal power extends to the elimination of labor disputes burdening interstate commerce in other forms. *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295; *Loewe* v. *Lawler,* 208 U. S. 274; *Duplex Printing Co.* v. *Deering,* 254 U. S. 443; *Bedford Cut Stone Co.* v. *Stone Cutters' Ass'n,* 274 U. S. 37. It cannot be questioned, therefore, that Congress acted within its constitutional power in adopting special preventive means to avoid such burdens at least where, as Congress found in Section 1 of the Act, they are caused by industrial strife "(a) impairing the efficiency, safety, or operation of the

instrumentalities of commerce", or "(b) occurring in the current of commerce." Nor can it be contended that a showing of a specific intent to affect commerce is necessary in each case. *Anderson* v. *Shipowners Association,* 272 U. S. 359, 363–364; *United States* v. *Patten,* 226 U. S. 525, 543; *Texas and New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548; *Industrial Association* v. *United States,* 268 U. S. 64, 81; *Stafford* v. *Wallace,* 258 U. S. 495.

The existence of a power in Congress to protect interstate commerce from these burdens is in no way inconsistent with the statement that "the relation of employer and employee is a local relation." *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 308. That statement cannot be understood as in conflict with the cases in which Congress has subjected that relationship to valid regulation. *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420; *Patterson* v. *Bark Eudora,* 190 U. S. 169; *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612; *Southern Ry. Co.* v. *United States,* 222 U. S. 20; *Second Employers' Liability Cases,* 223 U. S. 1; *Wilson* v. *New,* 243 U. S. 332. See also *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 370, and cases cited at p. 42, *supra.* Thus, on the very subject matter here involved, although it be said that the right to join a labor organization is, standing alone, a local matter, that right may be protected by Congress where its protection will assist in maintaining the

orderly conduct of interstate commerce, and in furthering the peaceful settlement of disputes which threaten it. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548. Similarly, although the rates charged by commission men and local dealers in sales at stockyards may be considered as "affecting only intrastate commerce when considered alone", they may be regulated by Congress when and to the extent that their regulation is found desirable to protect interstate commerce from recurrent burdens and obstructions. *Stafford* v. *Wallace*, 258 U. S. 495, 520; *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420. See also, *e. g.*, *United States* v. *Ferger*, 250 U. S. 199; *The Minnesota Rate Cases*, 230 U. S. 352.*

We submit, therefore, that beyond any question industrial strife, at least in enterprises in interstate or foreign commerce, constitutes a burden on that commerce which Congress may remove or prevent. The remaining question is whether the means employed here are appropriate to that end.

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* Of course, the existence of a power of Federal control over certain aspects of these matters does not mean that the States may not likewise regulate other aspects, for it is well established that the power of State and nation may overlap to some extent. Consequently, it cannot be urged that the power of Congress is necessarily delimited by decisions upholding state taxation or regulation. *Stafford* v. *Wallace*, 258 U. S. 495, 525; *Binderup* v. *Pathé Exchange*, 263 U. S. 291, 311; *Minnesota* v. *Blasius*, 290 U. S. 1; *Dickson* v. *Uhlmann Grain Co.*, 286 U. S. 188; *Wiloil Co.* v. *Pennsylvania*, 294 U. S. 169, 175.

2. Subsections (1) and (3) of Section 8 of the National Labor Relations Act Provide a Reasonable Means of Eliminating the Burdens on Interstate Commerce Arising Out of Industrial Strife

Industrial disputes are of two basic types. The first type arises out of employer resistance to the attempt of employees to form and maintain labor organizations, to obtain recognition of these organizations, to bargain collectively, and the like—briefly, the struggles to organize and establish the procedure of collective bargaining. The second type of dispute arises over the substantive terms of the employment contract, such as rate of wages, hours of work, or other matters of working conditions.*

Subsections (1) and (3) of Section 8 of the Act, which are the only provisions invoked against petitioner, bear upon both types of industrial controversies, by eliminating the causes of the first, and by affording a basis for the amicable and permanent adjustment of the second through the procedure of voluntary negotiation and collective bargaining conducted by freely chosen representatives of the employees.*

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* This distinction between the two basic types of labor disputes is well recognized. See Fitch, *Causes of Industrial Unrest* (1924) p. 92 *et seq.*; *Final Report of the Commission on Industrial Relations* (1916), Senate Doc. No. 415, 64th Cong., 1st Sess., Vol. I, p. 67; *Report of the Anthracite Coal Strike Commission* (1903), Sen. Doc. No. 6, 58th Cong., Spec. Sess., p. 31.

* The non-legal materials in the present brief were collected by the Division of Economic Research, National Labor Relations Board. David J. Saposs, Chief Economist;

(A) THE ACT ELIMINATES INDUSTRIAL STRIFE GROWING OUT OF THE EFFORTS OF EMPLOYEES TO ORGANIZE AND BARGAIN COLLECTIVELY BY REMOVING THE CAUSES OF SUCH STRIFE

As an inevitable outgrowth of modern business organization, employees have attempted to associate for mutual aid and protection. The gross inequality of bargaining power between the individual employee and the ordinary corporate employer has made such association, at least from the employee's point of view, of great importance. Its importance has become more and more acute with the development of modern business and its huge aggregations of capital. This Court has given full recognition to these elementary facts. *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184, 209; *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 570–571.

It is equally fundamental that interference by an employer with the efforts of the employees to exercise their liberty of association must often lead to open conflict—a strike or lock-out. If a group of employees attempts to form a labor organization, and their employer meets that effort by discharging the leaders of the movement, or by similar methods of opposition, there is no basis for adjustment except helpless submission or economic warfare.

George S. Wheeler, Associate Economist; George Brooks, Assistant Economist; Jean M. Paton, Jacob Karro, Louis R. Becker, Elizabeth T. Bliss, Junior Economists.

Issues of this sort have played a decisive part in bringing on conflicts in a great many of our industrial disturbances. A dramatic illustration arose during the World War. In April 1918, as a result of the practice of the principal telegraph companies in discharging employees for membership in the Commercial Telegraphers Union of America, some 20,000 telegraph employees voted to go on strike. The strike was postponed at the instance of the War Labor Board, which made an effort to settle the controversy. The companies refused to comply with the Board's recommendation that they desist from their practice of dismissing employees for joining the union. President Wilson publicly requested the companies to comply, but the persistent opposition of one of the companies to the union affiliation of its employees continued, and again a strike was scheduled. No procedure had been established for the enforcement of the recommendations of the War Labor Board. In order to prevent threatened paralysis of a part of the system of electrical communication, the President took control of the telegraph and telephone lines pursuant to a resolution enacted by Congress on July 16, 1918.[10]

The Pullman strike of 1894 is another typical example. According to the report of the Federal

[10] Bulletin No. 287, National War Labor Board (U. S. Bureau of Labor Statistics, 1921) pp. 24–25; Berman, *Labor Disputes and the President of the United States* (1924) pp. 142–145.

commission of inquiry appointed under the Act of 1888 (c. 1063, 25 Stat. 501), the immediate controversy between the Pullman Company and its workers concerned a reduction in wages without a corresponding change in the rental of company-owned houses in and about Chicago in which most of the employees lived. A grievance committee of the men approached the management to protest against the wage reduction. Within three or four days the outstanding leaders of the group were discharged, and a strike immediately ensued. Subsequently the management declined to negotiate with the American Railway Union, representing the employees on strike, in regard to the terms of a settlement of the matters in controversy. In consequence, the area of conflict was extended to all the railroads and their employees in and about Chicago, the most important railroad center in the country. The Commission concluded:

> The Pullman Company is hostile to the idea of conferring with organized labor in the settlement of differences arising between it and its employees.
>
> * * * * *
>
> Since the strike, withdrawal from the American Railway Union is required from those seeking work. The Company does not recognize that labor organizations have any place or necessity in Pullman, where the Company fixes wages and rents, and refuses to treat with labor organizations. The laborer can work or quit on the terms offered;

> that is the limit of his rights. To join a labor organization in order to secure the protection of union against wrongs, real or imaginary, is overstepping the limit and arouses hostility. This position secures all the advantage of the concentration of capital, ability, power, and control for the company in its labor dealings, and deprives the employees of any such advantage or protection as a labor union might afford. In this respect the Pullman Company is behind the age.[10a]

Similar reports to the effect that employer interference with employees in their self-organization and collective bargaining is a prime factor in industrial disputes have been made by various commissions of inquiry over a long period of years.[11]

More important than these single instances are the statistics for industrial disputes generally. For many years, the denial of these rights of em-

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[10a] *Report on the Chicago Strike of June–July 1894*, by the United States Strike Commission of 1894–1895 on the Pullman Strike, pp. 25–27.

[11] *Report of Anthracite Coal Strike Commission* (1903), Senate Doc. No. 6, 58th Cong., Spec. Sess., pp. 31, 61; Senate Report No. 289, *Investigating Strike in Steel Industries*, 66th Cong., 1st Sess., p. 11; *Report of Commission on Industrial Relations* (1916), Senate Doc. No. 415, 64th Cong., 1st Sess., Vol. 1, p. 67; *Report of the Board of Inquiry for the Cotton Textile Industry* (Sept. 20, 1934); *Labor and the Government* (Twentieth Century Fund, 1935) pp. 126–131.

ployees has been the basic issue in between 20 and 50 percent of industrial disputes.[12]

This Act eliminates these needless, bitter struggles by eliminating their basic causes. Subsection (1) of Section 8 prevents employers from interfering with rights guaranteed to workers by Section 7, which include the right to self-organization, free selection of representatives, and collective bargaining. Subsection (3) makes the prohibition more specific, by declaring it to be an unfair labor practice to discriminate in regard to tenure, terms, or conditions of employment for the purpose of either encouraging or discouraging membership in any labor organization.

(B) THE ACT FACILITATES THE PREVENTION AND ADJUSTMENT OF INDUSTRIAL STRIFE ARISING OUT OF DIFFERENCES OVER TERMS AND CONDITIONS OF EMPLOYMENT

The operation of the Act in eliminating or mitigating industrial disputes over the substantive terms of employment is no less significant. The Act does not attempt to fix any hours, wages, or working conditions. Nor does it provide for compulsory arbitration. It does not require or tend toward the closed shop, but merely leaves the rule on that subject to be worked out in accordance with state statutes and state decisions.

The peaceful settlement of industrial disputes concerning wages, hours, and the like, upon a voluntary basis, must rest upon two fundamental

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[12] See Appendix, *infra*, p. 144.

principles. First, there must be negotiation, for obviously parties to a dispute who refuse to confer cannot reach an agreement. Second, these negotiations, to be successful, must be conducted by representatives who have been freely chosen by each party to the dispute. Subsections (1) and (3) of Section 8 are designed to facilitate the establishment of these two fundamental requirements by insuring employees freedom in their organization and choice of representatives. Without such freedom no negotiation is possible; with it, many differences which otherwise would be settled by economic force may be settled in a peaceful manner.

The appropriateness of these means in eliminating industrial strife has been expressly approved by this Court. In *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, after holding that Congress might properly, under the commerce power, facilitate the amicable adjustment of labor disputes on interstate railroads, this Court said (p. 570):

> In shaping its legislation to this end, Congress was entitled to take cognizance of actual conditions and to address itself to practicable measures. The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and con-

ditions of work. *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 209. Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action would be a mockery if representation were made futile by interferences with freedom of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both.

There is no distinction between the statutory provisions involved in the present case and that sustained in the *Texas & New Orleans* case. Both protect employees in their self-organization and free choice of representatives, and both are the very basis of a statutory scheme to make the appropriate collective action of employees an instrument of peace rather than of strife. In each statute, the restraint in question is imposed upon the employer in order to prevent disputes and promote amicable adjustments. Each statute, in other words, adopts a means reasonably related to the exercise of Congressional power to prevent industrial disputes from burdening or obstructing commerce. Compare *Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 347, footnote 5. Petitioner's argument that

the means provided in the statute are not appropriate (Br. pp. 61, 75–77), wholly ignores this controlling authority.

Contrary to petitioner's apparent contention (Br. p. 50), the record in the *Texas & New Orleans* case disclosed no evidence of a present or immediately threatened labor controversy interrupting interstate commerce. Such proof is of course unnecessary. It is sufficient that the practices regulated have the tendency to cause industrial strife which will directly affect, burden or obstruct interstate commerce. Compare *Baltimore & Ohio R. R.* v. *Interstate Commerce Comm.*, 221 U. S. 612; *Southern Railway* v. *United States*, 222 U. S. 20; *Second Employers' Liability Cases*, 223 U. S. 1; *Anderson* v. *Shipowners Association*, 272 U. S. 359; *United States* v. *Ferger*, 250 U. S. 199; *Stafford* v. *Wallace*, 258 U. S. 495; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1. Petitioner's further contention that the prohibition upheld in the *Texas & New Orleans case* applied only to "voluntary" proceedings under the Railway Labor Act (Br. p. 60) is discussed at pp. 87–89, *infra*.

The principles thus judicially approved are not novel or untried. On the contrary, they represent the culmination of a long series of efforts by the Federal Government to eliminate industrial strife on the interstate railroads, and are consonant with Federal experience with the same problem in other fields.

The first application by Congress of the policy of safeguarding the right of employees to organize and bargain collectively was in the field of labor disputes on the railroads. They are the chief instrumentalities of commerce, and it is natural that they should have been the first to occupy the attention of Congress.

The history of governmental efforts to achieve industrial peace on the railroads range from the original Act passed in 1888 (c. 1063, 25 Stat. 501) through the Erdman Act of 1898 (c. 370, 30 Stat. 424), the Newlands Act of 1913 (c. 6, 38 Stat. 103), the Adamson Act of 1916 (c. 436, 39 Stat. 721), the war-time experience of the Government, the Transportation Act of 1920, Title III (c. 91, 41 Stat. 456), the Railway Labor Act of 1926 (c. 347, 44 Stat. 577), and finally the Amended Act of 1934 (c. 691, 48 Stat. 1185).[13] From the beginning every statute has recognized the right of employees to choose their own representatives for negotiation, conference, or arbitration. *E. g.*, Act of October 1, 1888, *supra*, Sec. 4; Erdman Act of 1898, *supra*, Secs. 7, 10. The same policy was pursued

[13] Several adequate and impartial studies of railroad labor legislation have been made. See Bulletin No. 303, *Use of Federal Power in Settlement of Railway Labor Disputes* (U. S. Bureau of Labor Statistics, 1922); Witte, *The Government in Labor Disputes* (1932), pp. 238–244; *Labor and the Government* (Twentieth Century Fund, 1935), pp. 172 *et seq.*

while the railroads were under Government control during the War.[14]

When the railroads were released from Federal control shortly after the War, Congress, in order to insure that labor disputes should not interrupt or impair the continuity or efficiency of interstate transportation, passed the Transportation Act of 1920. Title III of that Act created a Railway Labor Board, with power to hear and decide disputes, but without power to enforce its decisions. As an integral part of the machinery so set up, Section 301 provided that both carriers and employees had a duty to exert every reasonable effort to decide disputes in conferences between representatives selected by each side.

Title III was brought before this Court in *Pennsylvania R. R. Co.* v. *United States Railroad Labor Board,* 261 U. S. 72, and *Pennsylvania Federation* v. *Pennsylvania R. R. Co.,* 267 U. S. 203. The Court expressly recognized the importance to the scheme set up by Congress of the right to organize and designate representatives for collective bargaining, and the intimate relation between these rights and the conduct of the carriers' business (see, *e. g.,* 261 U. S. at p. 83), but ruled that Congress had not intended to impose a mandatory

[14] Director General of Railroads, General Order No. 8, Feb. 21, 1918, par. 5, provided: "No discrimination will be made in the employment, retention, or conditions of employment of employees because of membership or nonmembership in labor organizations."

duty upon the railroads to forego interference with employees in the designation of representatives.

As thus interpreted, Title III failed to accomplish its purpose, and was replaced by the Railway Labor Act of 1926, amended in some respects by the Act of 1934. The principle of protection of the right of self-organization and collective bargaining was adopted. See Section 2, subsections first, second, third. The power of Congress to enact Section 2, third, was expressly upheld in *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, *supra,* pp. 41, 51–52.

The success of these principles in the railroad industry has been phenomenal. The National Mediation Board established by the 1934 Act was able to report, for the fiscal year 1935, that *every dispute had been settled peacefully.* (First Annual Report, p. 8.) For the fiscal year 1936 it reported in the railroad industry but one small strike involving less than 30 employees. (Second Annual Report, p. 1.) Its first annual report states (p. 8):

> We are pleased to report that during the year there were no strikes in the railroad industry. * * * Since the enactment of the Railway Labor Act in 1926 there has been an almost unbroken record of peaceful settlement of labor disputes on the railroads. * * * That the railroad industry could maintain such a peaceful record, especially since 1932 when strikes and industrial unrest have been prevalent in other industries

throughout the country, is testimony to the soundness and effectiveness of the labor policies formulated by Congress in the Railway Labor Act.

These results are even more significant when contrasted with the recurring industrial strife in the water and motor transportation fields, where there are fewer employees, and where labor organizations and other personnel structures are far less complex than on the railroads: [15]

	No. of disputes				No. of Workers Involved				Man-days of idleness			
	1933	1934	1935	*1936	1933	1934	1935	*1936	1933	1934	1935	*1936
Water transportation	14	76	122	36	3,071	28,890	28,460	8,206	22,733	1,686,987	748,894	119,230
Motor transportation	36	67	64	38	19,445	67,928	22,850	6,696	185,585	889,987	202,868	46,084
Railroads	0	0	1	0	0	0	26	0	0	0	56	0

* Includes only January to May 1936, and accordingly does not include the current maritime strikes.

The effect of the policies of the Railway Labor Act has been particularly marked in the development of comprehensive plans for "union-management cooperation" on the railroads, in the successful adjustment by mutual agreement of threatened disputes arising out of wage reductions during the depression period, and in the recent agreement re-

[15] Compiled from data published by the United States Department of Labor, Bureau of Labor Statistics, Bulletins No. R. 339 (1936), p. 4; No. R. 389 (1936), p. 4; *Monthly Labor Review* (May–September 1936), monthly "Analysis of Strikes."

garding unemployment problems arising out of the projected consolidation of railroad facilities.[18]

The plan of collective bargaining through freely chosen representatives of employees now in effect is all the more significant because it was arrived at after a long period of trial and error. During this period attempts were made, by statute or administrative decree, to fix the substantive terms of the employment contract. Such methods proved unacceptable in principle to both sides, and unworkable in actual practice. In the last analysis, the only important step in this direction on the railroads, the Adamson Act of 1916, sustained in *Wilson* v. *New,* 243 U. S. 332, as an emergency measure, was not the determining factor in the settlement of the threatened railroad strike for the eight-hour day. The strike was averted principally through the good offices of a committee of the Council of National Defense, appointed by the President in March 1917. See *First Annual Report of the National Mediation Board* (1935) pp. 61–62. Again, in the Transportation Act of 1920, the effort was made to have the parties accept harmoniously the awards rendered by the Labor Board in all disputes, including those regarding substantive terms of employment, the awards being enforceable by the sanction of public-

[18] *First Annual Report*, National Mediation Board (1935), pp. 8, 36; 80 Cong. Rec., pp. 7948–7952 (May 21, 1936); Otto S. Beyer, *The Machinery of Cooperation, The Partner, The New Labor Era* (1931), pp. 11, *et seq.*

ity. The result was that the Board was shunned by employers and employees alike, and its awards disregarded. *Id.*, p. 64. The same method had proved a failure under the original Act of 1888. *Ibid.* The voluntary agreement respecting displacement of employees in the consolidation of railroad facilities made unnecessary further consideration by Congress of a bill to fix the terms and conditions of employment in this connection. 80 Cong. Rec., pp. 7948–7952, *supra*, p. 58.

Congress acted wisely indeed when, in seeking to mitigate or eliminate industrial strife affecting interstate commerce generally by means of the National Labor Relations Act, it incorporated in that statute the best results of the half century of experience with railroad legislation outlined above.

The problem of labor strife on the railroads is, however, no different from that in other industries, and policies which have proved successful in the railroad industry may be expected to show a similar record of success in other fields. Indeed, unanimous agreement on the fundamental soundness of that approach is also found in the reports of various commissions established either by Congress or by the Executive to investigate labor disputes and make recommendations as to the best means for their elimination, and in the experience of the Federal Government during the World War, as well as during the period immediately preceding the passage of the National Labor Relations Act.

The first fruitful investigation of industrial strife was conducted by the Industrial Commission established by Congress in 1898 (c. 466, 30 Stat. 476). That Commission, consisting of five members of each House of Congress, and nine other persons representing different industries and employments, held hearings over a period of about three years. Over 700 witnesses and many official documents and court decisions were examined. The transcript of its testimony and its report, issued in 1902, comprised 19 substantial volumes.

The Commission found that "there is a general consensus of opinion that the voluntary extension and perfection of the system of collective bargaining, conciliation, and arbitration within the various trades themselves would prove highly advantageous, both to employers and workingmen and the general public." [17] The Commission went on to say (pp. 844–845):

> The chief advantage which comes from the practice of periodically determining the conditions of labor by collective bargaining directly between employers and employees is, that thereby each side obtains a better understanding of the actual state of the industry, of the conditions which confront the other side, and of the motives which influence it. Most strikes and lockouts would not occur if each party understood exactly the position of the other. Where represent-

[17] *Final Report of the Industrial Commission* (1902), Vol. 19, p. 844.

> atives of employers and employees can meet personally together and discuss all the considerations on which the wage scale and the conditions of labor should be based, a satisfactory agreement can, in the great majority of instances, be reached.
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> It is not to be supposed that the introduction of joint conferences and arbitration committees in a trade will render strikes and lockouts thereafter impossible. * * * Nevertheless experience both in England and in our own country shows that where these practices have once become fairly well established they greatly reduce the number of strikes and lockouts, and in many trades do away with them altogether for long periods of time. Even when a cessation of employment does intervene, the experience of the beneficial effects of peaceful methods usually leads to their reestablishment.

Similar conclusions were reached by the United States Anthracite Coal Strike Commission, and the United States Commission on Industrial Relations authorized by Congress in 1912.[18]

The conclusions of these Commissions were duplicated in the reports of the various agencies established to insure a full flow of goods in com-

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[18] *Report of the Anthracite Coal Strike Commission* (1902), Senate Doc. No. 6, 58th Cong., Spec. Sess., p. 64; *Final Report of Commission on Industrial Relations* (1916), Senate Doc. No. 415, 64th Cong., 1st Sess., Vol. I, pp. 61–68, 162, 215, 235.

merce during the World War.[19] By the autumn of 1917 it had become apparent that Government intervention in the spreading labor disputes would be necessary; consequently, in January 1918 a War Labor Conference Board, under the joint chairmanship of ex-President William H. Taft and Frank P. Walsh, was set up to make recommendations for a method of settling labor disputes for the duration of the War. These principles, unanimously recommended, and promptly adopted by the National War Labor Board, included the following:

> The right of workers to organize in trade unions and to bargain collectively, through chosen representatives, is recognized and affirmed. This right shall not be denied, abridged, or interfered with by the employers in any manner whatsoever.[20]

This policy was applied in numerous cases by the Board during the course of its sixteen months of operation.[21] The policy was also followed during the War by all other Governmental agencies concerned with labor relations, including the Ship-

[19] See Watkins, *Labor Problems and Labor Administration during the World War* (University of Illinois Studies in the Social Sciences, 1919) Vol. VIII, No. 3; Bulletin No. 287, *National War Labor Board* (U. S. Bureau of Labor Statistics, 1921), Chap. III.

[20] National War Labor Board, *Principles and Rules of Procedure* (1919), p. 4; Bulletin No. 287, *supra*.

[21] See Bulletin No. 287, *National War Labor Board* (U. S. Bureau of Labor Statistics, 1921), pp. 52–64. An illustration is the following statement from the decision of

building Labor Adjustment Board, the Director General of Railroads, the National Adjustment Commission, set up by voluntary agreement under the aegis of the United States Shipping Board to handle matters affecting longshoremen, and the Division of Marine and Dock Industrial Relations of the same Board, which dealt with ship personnel.[22]

Experience proved the soundness of this policy. Not a single strike or lockout was undertaken in defiance of an award of the National War Labor Board prior to the Armistice,[23] and the other war-

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the Board in the case of the New York Consolidated Railroad (Bulletin No. 287, *supra*, p. 264):

> The right of the workers of this company freely to organize in trade unions, or to join the same, and to bargain collectively, is affirmed, and discharges for legitimate union activities, interrogation of workers by officials as to their union affiliations, espionage by agents or representatives of the company, visits by officials of the company to the neighborhood of the meeting place of the organization for the purpose of observing the men who belong to such unions, to their detriment as employees of the company, and like actions, the intent of which is to discourage and prevent men from exercising this right of organization, must be deemed an interference with their rights as laid down in the principles of the board. * * *

[22] Bulletin No. 283, *History of the Shipbuilding Labor Adjustment Board* (U. S. Bureau of Labor Statistics), pp. 98–102; National Adjustment Commission, *Chairman's Report for the Period Ending Dec. 31, 1918*, pp. 9, 35; U. S. Shipping Board, *Report of the Director of the Marine and Dock Industrial Relations Division* (*Dec. 31, 1918*), p. 40.

[23] Witte, *The Government in Labor Disputes* (1932), p. 248. "In 138 recorded instances, and probably many others,

time adjustment agencies, considered together, functioned quite as effectively in a great number of disputes."[34]

During the immediate post-war period an attempt was made to continue the war-time method of adjusting labor controversies, and to preserve the means which had been found helpful during that trying period. In October 1919 President Wilson convened the First Industrial Conference, to which representatives of labor, employers, and the public were invited. The members of the Conference were unable to agree, however, and it adjourned without accomplishment.[35] President Wilson persisted, and constituted another conference which became known as the President's Industrial Conference. It assumed its duties on December 1, 1919, and rendered a report on March 6, 1920. The members of the conference were all representatives of the general public and in-

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strikes and lockouts were averted or called off as a direct result of the Board's intervention" (Bulletin No. 287, *supra*, p. 19). It is true that a large number of disputes occurred in 1917 and 1918. But, as Witte points out, "many of the strikes were outside war industries and most of the remainder were small affairs of short duration. At no stage did strikes seriously embarrass the United States in the World War—which is more than can be said of most of the warring countries" (*Id.*, pp. 248–249). See also Lauck and Watts, *The Industrial Code* (1922), p. 57.

[34] Witte, *supra*, p. 248; National Adjustment Commission, *Report of the Executive Secretary, 1919–1920*, pp. 5–6.

[35] *Proceedings of the First Industrial Conference* (Washington, D. C., 1920); Perlman and Taft, *History of Labor in the United States* (1935), pp. 490–491.

cluded some of the country's foremost citizens. In a unanimous report the Conference recommended the establishment of a National Industrial Board, local regional conferences, and boards of inquiry, with a view to settling disputes through mediation efforts wherever possible and, if such methods failed, through compulsory investigation and report by impartial agencies.[36] The Conference report declared:

> Representatives must be selected by the employees with absolute freedom. In order to prevent suspicion on any side, selection should be by secret ballot. There must be equal freedom of expression thereafter. All employees must feel absolutely convinced that the management will not discriminate against them in any way because of any activities in connection with shop committees.
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> The Conference is in favor of the policy of collective bargaining. It sees in a frank acceptance of this principle the most helpful approach to industrial peace. It believes that the great body of the employers of the country accept this principle. The difference of opinion appears in regard to the method of representation. In the plan proposed by the Conference for the adjustment of disputes, provision is made for the unrestricted selection of representatives by employees, and at the same time provision is

[36] *Report of Industrial Conference called by the President* (March 6, 1920), pp. 15–24.

> also made to insure that the representatives of employees in fact represent the majority of the employees, in order that they may be able to bind them in good faith."[27]

In 1933, in accordance with its established policy, Congress incorporated in the National Industrial Recovery Act a provision that every code, agreement, or license under that Act include the provisions of Section 7 (a), which declared the right of employees to organize and bargain collectively free from interference by employers.[28] No administrative machinery was established for the interpretation or enforcement of this section. However, in order to meet a rising tide of labor disputes, not unusual in similar periods of emergence from economic depression, the President, on August 5, 1933, appointed, at the request of representatives of employers and employees, a National Labor Board, under the Chairmanship of Senator Robert F. Wagner. The Board, operating under the principles embodied in Section 7 (a), functioned as a mediation and fact-finding agency. While this Board achieved considerable success in the settlement and prevention of industrial strife,[29] its lim-

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[27] *Id.*, pp. 11, 31.

[28] Section 7 (a) (1) and 7 (a) (2). These provisions of Section 7 (a) were not before the Court in *Schechter Corp. v. United States*, 295 U. S. 495.

[29] The work of the National Labor Board is discussed in Brown, *Selection of Employee Representatives*, Monthly Labor Review (January 19, 1935), pp. 1–18; Lorwin and Wubnig, *Labor Relations Boards* (The Brookings Institution, 1935), pp. 87 *et seq.*; *Labor and the Government*

ited powers proved ineffective precisely in those cases where its intervention was needed most, namely, those arising out of claimed violations of Section 7 (a).

During the Spring of 1934, a bill was introduced somewhat similar to the present Act in its substantive provisions (S. 2926, 73d Cong., 2d Sess.). After extended hearings before the Senate Committee on Education and Labor, that Committee reported the bill with amendments (Sen. Rep. No. 1184, 73d Cong., 2d Sess.). The bill was not given consideration on the floor of Congress because of pressure of adjournment. Instead, Public Resolution No. 44 (c. 677, 48 Stat. 1183) was adopted as a temporary substitute. This Resolution empowered the President to establish until the next year a board or boards authorized and directed to investigate issues, facts, and practices in controversies arising under Section 7 (a) of the National Industrial Recovery Act, or which were burdening and obstructing, or threatening to burden or obstruct, the free flow of interstate commerce (Sec. 1). Such boards were specifically empowered to order and conduct elections by secret ballot to determine the representatives of employees for the purpose of collective bargaining, and in that connection to exercise subpoena power. Election orders were to be enforced and reviewed in the same manner,

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(Twentieth Century Fund, 1935), pp. 194 *et seq.*; 78 Cong. Rec. pp. 12029–12032 (June 16, 1934).

so far as applicable, as orders of the Federal Trade Commission under the Federal Trade Commission Act (Sec. 2). The first National Labor Relations Board was established by the President under this Resolution, and operated for about one year,[30] until the appointment of the present Board under the present Act.

This Act is therefore the culmination of half a century of Federal experience with various aspects of the industrial disputes problem as it affects the national interest.[31] That experience shows that subsections (1) and (3) of Section 8 are, in fact, reasonably designed to prevent or mitigate industrial strife. We have in Section 1 of the Act the express Congressional finding that the provisions of the Act remove "certain recognized sources of industrial strife and unrest", and encourage "practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions." The Act was before Congress for two years. Extensive hearings were held, and the problems exhaustively

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[30] The work of the first National Labor Relations Board is discussed in Lorwin and Wubnig, *Labor Relations Boards* (The Brookings Institution, 1935), pp. 291–331; Wheeler, *Employee Elections Conducted by National Labor Relations Board*, Monthly Labor Review (May 1935), pp. 1149–1154; (October 1935), pp. 956–959.

[31] See also *Labor and the Government* (Twentieth Century Fund, 1935), pp. 363–373, 380–384, recommending legislation substantially in accord with the provisions of the Act.

studied."[33] Surely these findings, which are so completely supported by experience, cannot be found arbitrary and unreasonable. *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251, 263; *Stafford* v. *Wallace*, 258 U. S. 495, 521; *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corporation*, Nos. 226, 372, decided December 7, 1936.

We submit, therefore, that subsections (1) and (3) of Section 8 of the present Act are appropriate means for eliminating industrial strife.

C. *The Application of the National Labor Relations Act to this Petitioner in Its Relations with Its Editorial Employees is a Valid Exercise of the Commerce Power*

The foregoing discussion has indicated the fundamental constitutionality of the National Labor Relations Act as a reasonable and appropriate means of removing or diminishing industrial strife burdening and obstructing interstate commerce. There remains only the question, which must necessarily arise in each proceeding: may the Act be validly applied under the circumstances here involved?

This question, we believe, has been conclusively answered in the affirmative by *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281

[33] Hearings on S. 2926, 73d Cong., 2d Sess., Senate Committee on Education and Labor; Hearings on S. 1958, 74th Cong., 1st Sess., Senate Committee on Education and Labor; Hearings on H. R. 6288 (companion bill to S. 1958), 74th Cong., 1st Sess., House Committee on Labor. See also Sen. Rep. No. 573 and H. Rep. No. 1147, 74th Cong., 1st Sess.

U. S. 548. There is no essential difference between the employer there and the employer here. In each case Congress is dealing with an agency devoted to interstate service. Transmission across state lines, whether of information or of tangible commodities, is within the general concept of "intercourse" among the States. *Supra,* pp. 32–35. Nor is there any essential distinction between the types of employees with which the Court was concerned in the *Texas & New Orleans* case and the editorial employees of petitioner, including Morris Watson, around whom the interference and discrimination particularly centered. The labor organization in the *Texas & New Orleans* case was the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees of the Southern Pacific Lines in Texas and Louisiana, which, as its name implies, was composed of ticket sellers, baggage men, train dispatchers, and similar clerical employees. Just as in the case of railroad employees, the work of petitioner's editorial employees varies in the degrees of physical proximity to the physical transmission. The work of the "filing" editor—principally selection and control—immediately precedes and, indeed, directs the course of, transmission; the work of the other editorial employees may at times be slightly further removed. The same type of gradation exists in the railroad industry, ranging, for example, from conductors, train dispatchers and

baggage handlers to ticket clerks and like clerical employees. As we have shown above (*supra*, pp. 35–39), the work of these editorial employees is at the very hub of petitioner's system of interstate and foreign commerce. If any distinction is possible between these employees and the members of the Brotherhood of Railway Clerks, we submit that the former are closer to, and more directly connected with, the interstate operations of their employer than the latter.

Moreover, quite apart from this controlling authority, it is undeniable that industrial strife between petitioner and its editorial employees would in fact substantially and directly burden interstate and foreign commerce. The work of these employees in rewriting and filing news dispatches is an important and integral part of the functions of petitioner's world-wide communication enterprise. Cf. *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105. Obviously, a strike or lockout of petitioner's editorial employees would, in the words of the court below "be a dam to the flow of this news" (R. 442), and completely disrupt the collection and transmission of news. Particularly in the New York office, such a breakdown would seriously obstruct the flow of domestic news, and even more seriously cripple the distribution of foreign items, for the usual practice is to have all European news go through the New

York office (R. 64, 88). Other arrangements could, and have, on occasion, been made (R. 64), but the re-routing would be expensive and difficult, and itself a burden on interstate commerce within the constitutional concern of Congress. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 243–245; *McCall* v. *California*, 136 U. S. 104, 111. The interstate and foreign commerce of this far-flung communication system would thus be impaired, if not wholly paralyzed."

Indeed, if a labor dispute produced no more than a delay in the operations of the New York office, it would be a grievous burden to this interstate commerce. Most types of news items are, by their very nature, perishable. *International News Service* v. *Associated Press*, 248 U. S. 215. See p. 38, *supra*. If petitioner fails to supply fresh and complete news its member papers suffer, the great public interest in full and speedy news coverage from all parts of the world is frustrated, and petitioner's very existence is threatened (R. 310, 316).

" Thus, in its bill in equity seeking to enjoin the Board's hearing in this matter, petitioner alleged that "said defendants [officers of the Board] threaten to require many employees of complainant to appear before the Trial Examiner as witnesses, which will interfere with, and cause damage to, the complainant's business in the gathering and dissemination of news which must be performed expeditiously and without interruption during twenty-four hours of each day" (*Associated Press* v. *Herrick*, in Equity No. 82–98, injunction denied per Bondy, J., 18 F. Supp. 897 (S. D. N. Y.).

These editorial operations at the New York office are, we submit, within Federal power because they are in, or intimately connected with, interstate commerce. In this field the Court has given the widest application to the principles which are at the basis of the National Labor Relations Act as here applied: "The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations." *The Minnesota Rate Cases,* 230 U. S. 352, 399. "The power of Congress extends not only to the regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury * * * no matter what may be the source of the dangers which threaten it." *Schechter Corp.* v. *United States,* 295 U. S. 495, 544. If a subject is within Federal power in the light of these principles, the Tenth Amendment is inapplicable. *United States* v. *California,* 297 U. S. 175.

Thus, there has been no hesitation in subjecting employment relations in interstate businesses to appropriate Federal legislation, even where the relation between the particular employees regulated and the interstate operations was not so close as in the case at bar. Apart from *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,*

281 U. S. 548, in which the Railway Labor Act was applied to ticket-sellers, train dispatchers, station men, baggage handlers and the like, there are many cases in which the Employers Liability Act has been given wide application; for example, to injuries suffered by interstate employees through negligence of an intrastate employee (*Second Employers' Liability Cases*, 223 U. S. 1, 51–52), and to injuries suffered by the cook for a bridge repair crew (*Philadelphia, B. & W. R. Co.* v. *Smith*, 250 U. S. 101). Nor do such decisions by any means go to the limit of Federal power. *Illinois Central R. R. Co.* v. *Behrens*, 233 U. S. 473, 477–478. Cf. *Texas & Pacific Ry.* v. *Rigsby*, 241 U. S. 33, 39. See also *Di Santo* v. *Pennsylvania*, 273 U. S. 34; *Southern Ry. Co.* v. *United States*, 222 U. S. 20.

Moreover, whether or not the editorial office be regarded as a part of interstate commerce itself, this work is clearly carried on in a "practical continuity of movement", *Schechter Corp.* v. *United States*, 295 U. S. 495, 543, at the "throat" of a well-defined "current" or "flow" of commerce. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 305. This concept of a "current" or "flow" of interstate commerce has been invoked under the commerce clause to sustain Federal regulation, or to deny authority to the States, in respect of transactions in a regular course of business involving purchases within a State for the purposes of subsequent shipment to other States, *United States* v. *Read-*

ing Co., 226 U. S. 324, 367; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50; *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189; *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265; *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277; involving leases contemplating shipment from another State, *Binderup* v. *Pathe Exchange*, 263 U. S. 291; and involving commodities which have come to rest as the result of shipment from other States and are intended to be the subject of further shipments in interstate commerce, *Stafford* v. *Wallace*, 258 U. S. 495; *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1.

The fact that the "news" coming into the New York office is halted in some instances for a very brief period and "rewritten" or selected and thereafter "filed" (that is, put on the wire for transmission), does not make the "flow" analogy inapposite. This editorial treatment no more interrupts the continuity of the flow than did the change of stock reports from Morse code to ticker symbols in *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105. See also *Caldwell* v. *North Carolina*, 187 U. S. 622; *National Labor Relations Board* v. *National New York Packing Co.*, 86 F. (2d) 98 (C. C. A. 2d). Indeed, without such editorial employees the distribution of news would be practically impossible. See *Heyman* v. *Hays*, 236 U. S. 178, 186. Moreover, "continuity of transit" is not essential. Federal power extends to practices directly affecting the flow of commerce and occurring at a "throat"

through which the current passes, where the articles in question have come to a temporary rest and acquired a situs within the State, either for purposes of local sale and complete processing over an extended period, *Stafford* v. *Wallace, supra,* or for purposes of temporary storing, inspecting, mixing, weighing, grading, repacking, and sale. *Chicago Board of Trade* v. *Olsen, supra. Cf. Minnesota* v. *Blasius,* 290 U. S. 1; *Bacon* v. *Illinois,* 227 U. S. 504.

If the relation between the subject regulated in the *Stafford* and *Olsen* cases and the flow of interstate commerce was close enough to bring the regulation within the Federal power, then the relationship is certainly close enough to sustain the National Labor Relations Act as applied to the editorial employees of this petitioner in its New York City office. In the cases referred to, the requisite burden on commerce was found in the economic effect of the practices regulated on interstate prices. Here the burden resulting from industrial strife is far more direct and disastrous because its necessary effect would be the immediate interruption of interstate and foreign commerce itself, as carried on through the highly important New York office. The burden is at least equally recurring, and its existence, causes, and effects equally firmly grounded in Congressional findings and the information and experience available to Congress.

Lastly, it is submitted that even if it be decided that Morris Watson and the other editorial em-

ployees of petitioner at its New York City office are not engaged "in or about commerce", but in some occupation analogous to "production" or "manufacture" of news, nevertheless the Act is validly applied under the principles set forth in the brief filed on behalf of the National Labor Relations Board in No. 419, *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation.*

II

SUBSECTIONS (1) AND (3) OF SECTION 8 OF THE NATIONAL LABOR RELATIONS ACT ARE, AS APPLIED TO THE PETITIONER, CONSISTENT WITH THE FIFTH AMENDMENT

The order of the court below (R. 445) directs petitioner (1) to cease and desist from discouraging membership in the American Newspaper Guild or any other labor organization of its employees, by discharging or otherwise discriminating against its employees for joining the Guild or any other labor organization, and from in any other manner interfering with, restraining or coercing its employees in the exercise of rights guaranteed in Section 7; and (2) to offer full reinstatement, with reimbursement for loss of pay, to Morris Watson, an employee found to have been discriminated against because of his exercise of said rights. This order of the lower court enforces without alteration the Board's order (R. 432–433), which is based exclusively upon a finding that petitioner had violated subsections (1) and (3) of Section 8 of the Act. It is necessary to consider,

therefore, only the validity of those subsections, which go no further than to forbid interference, coercion or discrimination against employees because of membership or activity in a labor organization. No other subdivisions of Section 8 has been invoked against petitioner in this case, it has not suffered injury from those other subdivisions, and it has now no standing to complain of them. *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, 43; *Champlin Refining Co.* v. *Commission,* 286 U. S. 214, 234–235.[34]

With respect to the provisions which are here involved, the Board contends, first, that their validity under the Fifth Amendment is sustained by the decision in *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548; and, second, that in any event the provisions are reasonable and consonant with due process.

A. *The Issue of Due Process is Governed by Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks, 281 U. S. 548*

The *Texas & New Orleans* case arose under the Railway Labor Act of 1926, c. 347, 44 Stat. 577.[35]

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[34] See pp. 108–124, *infra.*

[35] The Railway Labor Act of 1926, in its original form and as amended by the Act of 1934, is considered in detail in the briefs filed in No. 324, *The Virginian Railway Co.* v. *System Federation No. 40,* Present Term.

That statute, in order to prevent industrial disputes on the railroads, established machinery for mediation, negotiation, and collective bargaining.[36] In that Act (as it read when the *Texas & New Orleans* case was decided) Congress, in Section 2, subdivision third, had provided that:

> Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, *without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other.* [Italics supplied.][37]

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[36] The National Labor Relations Act, like the Railway Labor Act, provides the machinery for voluntary negotiation between representatives of management and labor; but the National Labor Relations Act, unlike the Railway Labor Act, does not provide for mediation by a Government tribunal, inasmuch as machinery for such mediation had already been created, and did not need to be duplicated. Section 8 of the Act of March 4, 1913, c. 141, 37 Stat. 738; U. S. C., Title 5, Sec. 619. See also the last sentence of Section 4 (a) of the National Labor Relations Act.

[37] For purposes of comparison, the relevant portions of Section 8 (1) and (3) of the National Labor Relations Act, upon which this order was based, are set out:

> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights [to self-organization and free choice of representatives] guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employ-

In the *Texas & New Orleans* case, the Brotherhood filed a bill of complaint alleging that the railroad had intimidated members of the Brotherhood and persuaded and coerced them to withdraw from membership, and prayed that the railroad be restrained from such interference, influence, or coercion in violation of the statute. On preliminary hearing the District Court found the facts to be substantially as alleged and issued a temporary injunction, virtually in the words of the statute, restraining the carrier "from in any way or manner interfering with, influencing, intimidating, or coercing" the employees "with respect to their free and untrammeled right of selecting or designating their representatives for the purpose of considering and deciding any and all disputes between said clerical employees and the defendant Railroad Company" (281 U. S. at 555–556, note).

The railroad had earlier organized a so-called "company union", the Association of Clerical Employees—Southern Pacific Lines. The District Court found that notwithstanding the temporary injunction, the agents of the railroad continued to solicit membership for this association. Employees active in its affairs made reports to the railroad, and were paid by it for their expenses and time. Five of the leading members of the Brotherhood were discharged for their activity in its behalf (24 F. (2d) at 431–434). The District Court found

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ment to encourage or discourage membership in any labor organization. * * *

the railroad guilty of contempt and ordered it to purge itself by: (1) disestablishing the Association which it was supporting, until the employees had chosen, by secret ballot, between it and the Brotherhood; (2) ceasing to extend favors to the Association not also offered to the Brotherhood; and (3) reinstating the employees and making them whole for any loss of wages suffered by reason of their discharge (24 F. (2d) at 434. See also Record, No. 469, October Term, 1929, pp. 267 *et seq*).

Thereafter the Brotherhood filed an amended bill of complaint which substantially incorporated the new matter, including the discriminatory discharges proved in the contempt proceedings. (Record, No. 469, October Term, 1929, pp. 314–369.) Upon final hearing the District Court made permanent the temporary injunction and denied a motion by the carrier to vacate the order in the contempt proceedings (*Id.*, pp. 402–404; 388–394. See also 25 F. (2d) 873, 25 F. (2d) 876).[38]

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[38] "The status restored", said the District Court, "was disturbed by the railroad company *in violation of the law and of the injunction*. From disturbing this status the railroad was and is expressly enjoined by the statute and the order of this court * * * But, if the employees have the right, which the statutes here say they have, to freedom in the matter of self-organization and the selection of representatives from interference, influence, or coercion on the part of the defendant company, then the injunction has done no more than to insist upon that right, and the contempt order no more than to make that injunction effective" (25 F. (2d) at 878). [Italics supplied.] The District Court also pointed out that the reinstatement order gave no

The decree of the Circuit Court of Appeals for the Fifth Circuit affirmed all three of the orders of the District Court (33 F. (2d) 13), and upon certiorari this Court in turn affirmed the decree of the Circuit Court of Appeals. This Court accepted the findings of the lower courts (281 U. S. at p. 560):

> The circumstances of the soliciting of authorizations and memberships on behalf of the Association, the fact that employees of the Railroad Company who were active in promoting the development of the Association were permitted to devote their time to that enterprise without deduction from their pay, the charge to the Railroad Company of expenses incurred in recruiting members of the Association, the reports made to the Railroad Company of the progress of these efforts, *and the discharge from the service of the Railroad Company of leading representatives of the Brotherhood* and the cancellation of their passes, gave support, despite the attempted justification of these proceedings, to the conclusion of the courts below that the Railroad Company and its officers were actually engaged in promoting the organization of the Association in the interest of the Company and in opposition to the Brotherhood, and that *these activities constituted an actual interference*

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continuous status, but merely required that an act of unlawful interference be undone, and insured that it not occur again for the same or similar reasons. 25 F. (2d) at 877.

> *with the liberty of the clerical employees in the selection of their representatives.* [Italics supplied.]

Regarding the orders made, the Court refused to find "that the decree below goes beyond the proper enforcement of the provision of the Railway Labor Act" (p. 571).

In response to the carrier's argument that if the statute authorized the decree it was invalid under the Fifth Amendment, this Court, after disposing of the question of power under the commerce clause, stated (p. 570):

> Exercising this authority, Congress may facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation. In shaping its legislation to this end, Congress was entitled to take cognizance of actual conditions and to address itself to practicable measures. The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 209. Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather

than of strife. Such collective action would be a mockery if representation were made futile by interferences with freedom of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both.

The provisions of the National Labor Relations Act here involved and the present order correspond in every manner material to the due process issue with Section 2, third, of the Railway Labor Act and with the three orders of the District Court in the *Texas & New Orleans* case. We submit, therefore, that their validity under the Fifth Amendment is established by the decision of this Court in that case.

Petitioner, however, seeks to distinguish the *Texas & New Orleans* decision by asserting that there this Court upheld the order requiring the carrier to restore the discharged men to their employment and to reimburse them for loss of pay on the ground that it was a valid method of permitting the carrier to purge itself of contempt in violating the temporary injunction. (Br. pp. 60, 93.) It is clear from the foregoing, however, that this Court had before it not only the contempt order but the temporary and final injunctions, and put its decision affirming the rulings below squarely on the ground that the Act, as interpreted

and applied by the courts below, was constitutional. The original decree of the District Court was cast in terms substantially identical with the statute. Since the discriminatory discharges were held violations of the injunction, as petitioner admits (Br. p. 93), they were interferences prohibited by the statute. Moreover, the circumstances of these discharges were realleged in the amended bill of complaint, on the basis of which the temporary injunction was made permanent, and the validity of Section 2, third, of the Act considered and decided. This Court properly regarded "the discharge from the service of the Railroad Company of leading representatives of the Brotherhood" (281 U. S. at 560) not merely a violation of the injunction (p. 557) but "an actual interference with the liberty of the clerical employees in the selection of their representatives" (p. 560), and hence a violation of the *statute*. And in affirming as within the proper enforcement of the Act the order requiring reinstatement of the discharged employees and payment of their back wages, this Court decided that it constituted an appropriate auxiliary remedy to supplement the prohibition against discrimination spelled out in Section 2, third, of the Act.

Petitioner relies upon *Adair* v. *United States*, 208 U. S. 161, and *Coppage* v. *Kansas*, 236 U. S. 1. (Br. pp. 70–73.) In the *Texas & New Orleans* case this Court considered both these cases and

expressly rejected them as inapplicable (281 U. S. at 570–571):

> The petitioners invoke the principle declared in *Adair* v. *United States*, 208 U. S. 161, and *Coppage* v. *Kansas*, 236 U. S. 1, but these decisions are inapplicable. The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing. As the carriers subject to the Act have no constitutional right to interfere with the freedom of the employees in making their selection, they cannot complain of the statute on constitutional grounds.

The Court thus held that the discharge of employees because of activity in the Brotherhood was not a "normal exercise of the right" to hire or discharge employees which is protected under the due process clause of the Fifth Amendment. Likewise under the present Act, as the court below pointed out (R. 445), there is no interference with the normal right to hire or discharge, for inefficiency or any other reason satisfactory to the employer, "provided he does not use the power of discharge as a weapon for interfering with the right of employees to organize and bargain collectively."

The *Adair* and *Coppage* cases need not be extensively analyzed here. It is sufficient to say

that both decisions were vigorously urged by the carrier in the *Texas & New Orleans* case. The facts of the latter case are so similar to those of the case at bar that the earlier cases, if inapplicable there, cannot be applicable here."

Petitioner also argues that the Railway Labor Act prohibited interference with representatives only for purposes of proceedings in arbitration and mediation under that Act (Br. pp. 59–60). The contrary is plainly evident. In the Act of 1926, Congress, while providing for voluntary adjustment and arbitration of disputes, specifically added a "distinct prohibition against coercive measures" in the choice of representatives, and in the exercise by employees of their right of self-organization, for the lack of which the previous Act of 1920 had

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[11] It is not difficult to find other appropriate grounds for regarding the *Adair* and *Coppage* cases as inapplicable to the Railway Labor Act of 1926 and the National Labor Relations Act. In the *Adair* case the provision imposing a criminal penalty for the discharge of railroad employees by reason of their membership in a labor organization had, in the opinion of the majority of this Court, no bearing upon interstate commerce. The majority could see no "legal or logical connection * * * between an employe's membership in a labor organization and the carrying on of interstate commerce." 208 U. S. at 178; and see at p. 175. See also *Coppage* v. *Kansas*, 236 U. S. at 16. The due process issue in the *Adair* and *Coppage* cases, therefore, was simply whether the restriction of the liberty of the employer by drastic criminal penalties could be justified on the general ground that it promoted the interests of the employees or labor organizations.

So far as the Federal power is concerned, in the years following the *Adair* decision, experience has shown and this

failed fully to accomplish the Congressional purposes. (281 U. S. at 564–568). Under the Act of 1926, the process of negotiation between the parties themselves was the first line of defense against labor disputes (Sec. 2, first, second), and it would have been strange indeed if the statutory protection in choice of representatives did not apply at that stage. On petitioner's theory, the prohibition against interference should not have been applicable at all in the *Texas & New Orleans* case, since the carrier had declined to submit the controversy in question to arbitration or mediation by the Railroad Labor Board (281 U. S. at 559; 24 F. (2d) at 432–433). Yet the precise controversy before the Court in that case was "with respect to the

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Court has recognized that the question of free choice of employee representatives *has* an important bearing on the conduct of interstate commerce, *Pennsylvania R. R.* v. *U. S. Railroad Labor Board*, 261 U. S. 72, 83; that there *is* both a legal and a logical connection between protection to self-organization and collective bargaining, and the carrying on of interstate commerce; and consequently, that protection of such rights constitutes a valid exercise of the commerce power. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 570; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 369. The recognition of this change in the factual basis of the Act has a significant bearing not only on the commerce issue but also on the due process issue. For the question under the due process clause is no longer whether the restriction upon employers is justifiable merely as promoting the welfare of employees, but whether it is justified as a reasonable limitation for the effectuation of an end within Federal power—the peaceful settlement of industrial disputes threatening the free flow of interstate commerce.

construction, validity, and application of this statutory provision" (281 U. S. at 558). And this Court specifically upheld and enforced the prohibition of interference with choice of representatives "for the purpose of negotiation and conference between employers and employees" (p. 570), that is, for purposes of collective bargaining.

B. *Apart From Controlling Authority, the Provisions Here Involved are Reasonable and Consonant with Due Process*

We believe that the *Texas & New Orleans* case is a controlling precedent upon the precise due process issue in the present case. However, it may be helpful to set out some of the considerations which establish the reasonableness of the Act without regard to the close parallel found in the facts of that case.

The Fifth Amendment serves to invalidate legislation only so far as "the means selected" are "unreasonable, arbitrary or capricious", and have no "real and substantial relation to the object sought to be attained." *Nebbia* v. *New York,* 291 U. S. 502, 525. The policy and wisdom of the statute, to which petitioner's brief is principally addressed, are for Congress. The earnest conflict of serious opinion does not bring these matters within judicial cognizance. *Chicago, B. & Q. R. R. Co.* v. *McGuire,* 219 U. S. 549, 569. We have shown earlier that industrial disputes recurrently and substantially burden and obstruct interstate and

foreign commerce, and that unfair labor practices, such as discriminatory discharges based on union membership, not only constitute a major cause of industrial disputes but also establish conditions under which neither temporary adjustments nor lasting settlements can be made. Congress has, therefore, a legitimate interest in eliminating such practices, and subsections (1) and (3) of Section 8 represent a Congressional power exercised in regulation of interstate commerce.

It is apparent that the means used here—including the procedure of complaint, hearing, and cease and desist order, the basic prohibition against interference with employee organization and representatives through discriminatory discharge, and the remedial order to restore the status disturbed by violation of that prohibition—have a real and substantial relation to the object sought to be attained. The principal remaining question, therefore, is whether the prohibition itself is an "unreasonable, arbitrary or capricious" means of accomplishing that end, in that it imposes a supposed unconstitutional limitation upon the freedom of petitioner. That this is far from being the case can readily be seen from a consideration of the basic liberties of employees here given protection, and the corresponding restraints imposed upon employers.

This Court has given complete recognition to the powerful and legitimate incentives which motivate employees in the formation of labor organizations

for the advancement of their interests. In *American Foundries* v. *Tri-City Council*, 257 U. S. 184, the Court said (p. 209):

> They [labor unions] have long been thus recognized by the courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. * * * The right to combine for such a lawful purpose has in many years not been denied by any court.[40]

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[40] See generally, Hoxie, *Trade Unionism in the United States* (1923), pp. 219–222; Daugherty, *Labor Problems in American Industry* (1933), pp. 413–415; Fitch, *Causes of Industrial Unrest* (1924), pp. 90–91. Compare *Holden* v. *Hardy*, 169 U. S. 366, 397.

The efforts of editorial employees and reporters to associate in labor organizations date from the 1890's, have paralleled those of manual and other professional workers, and have not been peculiar to journalists in the United States. *Final Report of the Industrial Commission* (1902), Vol. 7, pp. 275–276; U. S. Senate Commission on Industrial Relations, *Final Report and Testimony* (1906), Vol. 6, pp. 5547–5548; *Conditions of Work and Life of Journalists* (International Labor Office, Studies and Reports, Series L, No. 2, Geneva, 1928), pp. 45–46, 49. During the depression, considerable unrest developed among editorial employees and reporters, due to lowering of wage standards and the unemployment caused by the elimination and consolidation of

In *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, this Court reiterated (p. 570):

> The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. * * *

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various newspapers, notably the *New York World*. The American Newspaper Guild, the labor organization here involved, was organized in 1933, for editorial employees and reporters of press associations and newspapers. It is a national organization with local units in about 70 cities R. 195, 258, 264, 350, *et seq.*, 383, *et seq.*; 423–424). As of January 1, 1937, Guild chapters had negotiated written trade agreements with some 17 newspapers having a daily circulation of more than 2,946,000; and some 15 newspapers, with a daily circulation of 2,485,000, had posted notices embodying the results of negotiations with the Guild. The Guild also has verbal understandings with many other newspapers, providing for the orderly settlement of grievances as they arise. In regard to press services, Guild chapters have negotiated a written agreement with the New York branch of the Havas Agency, the French press service comparable to the Associated Press, and also have verbal understandings with three American press services, the International News Service, International News Photos, and the Universal News Service. *Editor and Publisher*, (Nov. 14, 1936), p. 10; (Dec. 5, 1936), pp. 5, 30; *Guild Reporter* (December 1, 1936), pp. 1–3, 5; (December 15, 1936), pp. 1–5; (January 1, 1937), pp. 2, 6; (Jan. 15, 1937), p. 4. (Circulation figures are for 1935, and are taken from *Editor and Publisher*, International Yearbook for 1936.)

Indeed the collective action of employees "with respect to the selection of representatives to confer with the employer in relation to contracts of service" was found in that case to be a property interest. 281 U. S. at 571.

An employer seeking to combat the exercise of these rights by employees has at his disposal economic weapons of overwhelming power. Through the abrupt discharge of union leaders or members, threats to discharge others, and similar methods of opposition, the employer may destroy self-organization on the part of his employees and defeat their efforts at collective bargaining through representatives of their own choosing. The actual liberty of employees to exercise rights recognized by this Court as justly theirs is destroyed by the employer's unrestricted freedom to discharge employees on account of membership in a labor organization or active participation in its affairs, as the facts of this case bear witness (R. 234, 243; 430). The appropriate collective action of employees is reduced to a mockery where representation is thus made futile by such interferences with freedom of choice. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. at 570. The Act as here applied merely safeguards this recognized and essential liberty of employees by placing a limited and reasonable restriction on the employer's use of his power of discharge.

There is nothing unusual in such regulation. It is familiar law that an act perhaps lawful in itself

may become unlawful if engaged in with wrongful intent or as part of a plan to achieve an unlawful end. Cf. *Aikens* v. *Wisconsin*, 195 U. S. 194, 206; *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 375; *American Bank & Trust Co.* v. *Federal Reserve Bank of Atlanta*, 256 U. S. 350. Curtailments of the employer's liberty have repeatedly been sanctioned whenever the legislation has been shown to have a reasonable relation to a proper governmental end. For example, the due process clause of the Fifth or Fourteenth Amendment is not violated if the hours of labor are regulated;[41] if the method of calculating,[42] or the manner[43] or time[44] of paying wages is prescribed; if common law defenses against recovery for injury in the course of employment are restricted or eliminated;[45] if the employer is forbidden to refuse service letters upon discharge,[46] or to

[41] *Holden* v. *Hardy*, 169 U. S. 366; *B. & O. R. R. Co.* v. *I. C. C.*, 221 U. S. 612; *Bunting* v. *Oregon*, 243 U. S. 426; *Muller* v. *Oregon*, 208 U. S. 412; *Riley* v. *Massachusetts*, 232 U. S. 671; *Miller* v. *Wilson*, 236 U. S. 373; *Radice* v. *New York*, 264 U. S. 292.

[42] *McLean* v. *Arkansas*, 211 U. S. 539; *Rail & River Coal Co.* v. *Yaple*, 236 U. S. 338.

[43] *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13; *Keokee Consolidated Coke Co.* v. *Taylor*, 234 U. S. 224.

[44] *Patterson* v. *Bark Eudora*, 190 U. S. 169; *Strathearn S. S. Co.* v. *Dillon*, 252 U. S. 348; *St. Louis, Iron Mt. & St. P. Ry. Co.* v. *Paul*, 173 U. S. 404; *Erie R. R.* v. *Williams*, 233 U. S. 685.

[45] *Second Employers' Liability Cases*, 223 U. S. 1.

[46] *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530; *Chicago, Rock Island & P. Ry. Co.* v. *Perry*, 259 U. S. 548.

enter into contracts with his workers which limit his liability in the event of future injury;" or if he is forbidden to employ child labor." These decisions are obviously not limited to enterprises "affected with a public interest." See also *Nebbia* v. *New York*, 291 U. S. 502, 536–537.

Nor is precedent lacking for the particular type of legislation at bar. On the railroads, the principle of protection of the employees' right of self-organization developed from half a century of experience with the regulation and, for several years, the governmental operation of the railroads. *Supra*, pp. 54–59. In other fields, the problem of industrial strife has been subject to exhaustive investigations at periodic intervals beginning in 1882. In all of these investigations the liberty of employees to organize has been recognized and accepted; in certain of them protection of that liberty, similar to the protection given by the Act before the Court, has been recommended for legislation. *Supra*, pp. 60–66. Such protection was approved and applied to war industries during the World War. *Supra*, pp. 61–64. Since that time like protection has been incorporated not only in the Railway Labor Act of 1926 and the amendments of 1934, but in the Norris-La Guardia Anti-Injunction Act (c. 90, 47 Stat. 70; U. S. C., Title 29, Secs. 102, 103); in the Bankruptcy amend-

[11] *Chicago, B. & Q. R. Co.* v. *McGuire*, 219 U. S. 549.
[12] *Sturges & Burn* v. *Beauchamp*, 231 U. S. 320.

ments of 1933 (c. 204, 47 Stat. 1481, Sec. 77 (p) and (q)), and of 1934 (c. 424, 48 Stat. 922; U. S. C., Title 11, Sec. 207 (1) (m)); in the Act for the coordination of interstate railroad transportation (c. 91, 48 Stat. 214; U. S. C., Title 49, Sec. 257 (e)); and in the National Industrial Recovery Act (c. 90, 48 Stat. 198, U. S. C., Title 15, Sec. 707 (a)). The principle has also found repeated recognition in various forms of state legislation, particularly in recent years.[49] Thus the protection of employees in their freedom of association has been for a long time a recognized and fundamental part of the policy of the Federal Government in all aspects of labor relations subject to its control or legislative authority, and has been approved as just and reasonable.

It is important to note how carefully restricted the Act is. It limits only petitioner's freedom to

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[49] Ariz. (1931) Rev. Code (Supp. 1934), Sec. 1360 a; Cal. (1933) Gen. Laws (Deering, Supp. 1933); Act 4104; Colo. (1931) Comp. L. (Supp. 1932), Sec. 4204, Laws, 1933, c. 59; Idaho, Acts, 1933, c. 215; Ill. (1933) Rev. Stat. (Cahill, 1933), Ch. 48, Sec. 237; Ind. (1933) Ann. Stat. (Burns, 1933), Sec. 40-503; La. Acts, 1934, No. 202; Md. Laws, 1935, c. 574; Mass. Laws, 1933, c. 351; Minn. (1933) Stat. (Mason, Supp. 1936), Sec. 4260-3; N. J. Laws, 1932, c. 244; N. Y. (1935), Consol. Laws (Supp. 1931-1935), Ch. 7, Sec. 17; N. Dak., Laws, 1935, c. 247; Ohio (1931) Gen. Code (Supp. 1926-1935), Part Second, Title II, ch. 17, Sec. 6241-1; Ore., Acts, 1931, c. 247, Acts, 1933, c. 355; Penna. (1933) Ann. Stat. (Purdon, pocket Supp. (1934)), Title 43, Sec. 205; Utah, Laws, 1933, c. 15; Wash., Laws, 1934, c. 7; Wis., Statutes, Sec. 103.46 (1929), Statutes (1933), Sec. 268.19. See also *United Mine Workers* v. *Coronado Coal Company*, 259 U. S. 344, 385-386.

coerce, restrain or discriminate against employees because of their exercise of recognized liberties. It does not compel organization into labor unions, or establish a closed shop.[50] As the court below pointed out (R. 445), the Act does not destroy or restrict any right of the employer which is important to the normal operation of his business. He retains full powers of management. He may discharge his workers for inefficiency, insubordina-

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[50] The proviso in Section 8, subsection (3) does not validate the closed shop agreement or force a closed shop on anyone. It merely declares that nothing in this Act shall *invalidate* such an agreement. The closed shop agreement is valid in New York (*Jacobs* v. *Cohen*, 183 N. Y. 207) and in other States in which petitioner operates. Congress did not wish to establish a uniform rule on this question, since the applicable law varied throughout particular localities, and consequently through this proviso, merely preserved the *status quo*. Under no circumstances can a closed shop agreement be made without the consent of the employer, since this is merely a matter for negotiation in the same manner as a request for higher wages or better working conditions. H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 19–20; Sen. Rep. No. 573, 74th Cong., 1st Sess., pp. 11–12. Moreover, no question of closed shop is involved in the case at bar and the issue of the validity of the proviso could properly arise only on the objection of an employee adversely affected. *Jeffrey Manufacturing Co.* v. *Blagg*, 235 U. S. 571.

Petitioner's contention in this respect (Br. pp. 79–80) is reduced to this: that legislative protection of employees in their self-organization and choice of representatives, even as against the grossest forms of coercion and interference, is repugnant to the Fifth Amendment because it would have the tendency to lead to the closed shop (Br. pp. 78–79, 82). This argument is obviously unsound, and ignores the express ruling of this Court in the *Texas & New Orleans* case.

tion, or any other reason whatever except membership in or activity in connection with a labor organization. The employer retains unimpaired his liberty to reach any bargain as to the wages he will pay and the working conditions he will furnish. *S. Buchsbaum Co.* v. *Beman*, 14 F. Supp. 444, 448 (N. D. Ill.). Compare *Adkins* v. *Children's Hospital*, 261 U. S. 525; *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522; *Morehead* v. *Tipaldo*, 298 U. S. 587. Nor does the Act delegate a legislative power to fix wage rates to private parties. Compare *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 310–312. It merely protects the employees, if they desire to organize, against specific unfair labor practices.[51] Far from imposing

[51] Petitioner objects (Br. p. 66) that the Act "recognizes but one type of representative for the purpose of collective bargaining, namely, the independent labor organization, completely free from employer domination, interference, or any form of support." This is the substance of Section 8, subsection (2), which is not involved in this case. It is obvious that without such provision, the collective action of employees in choosing representatives would be reduced to a mockery. Similar forms of interference were prohibited in the *Texas & New Orleans* case, quoted *supra*, p. 82. However, the Act does not favor the "outside" labor organization, or any other particular form of organization. The term "labor organization" used throughout the Act is defined broadly in Section 2, subsection (5) to mean "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

substantive terms of employment, the Act merely confirms and promotes the equal right of the employer and employees to adjust such terms by "private bargaining", and protects employees in their organization and choice of representatives for that purpose.

Petitioner argues that the Act is arbitrary because all its prohibitions are directed against employers (Br. pp. 77, 87–88). This argument ignores the realities of the situation and the essential purpose of the statute. Corresponding to the liberty of employees here given legislative protection against interference by employers, is the liberty of employers to organize and choose representatives for collective bargaining with employees. No claim has or could be made that this liberty of employers needs protection in Federal law. Congress was entitled to take cognizance of actual conditions and address itself to practicable measures; to safeguard, not ignore, the liberty of employees to associate and make of it an instrument of peace rather than of industrial strife. *Texas & New Orleans Railroad* v. *Brotherhood of Railway Clerks, supra,* at 570. In this respect the Act is no more "one-sided" than the Federal Employers' Liability Act or the Interstate Commerce Act. However, the Act weakens none of the employer's protections against any illegal action of employees or labor organizations under pre-existing law. The Act does not affect the application of the anti-trust laws to labor disputes,

nor the local police power. It leaves undisturbed existing statute and common law, both state and Federal, civil and criminal, in regard to picketing, intimidation, blacklisting, fraud, or violence by either side in labor disputes. Racketeering in the guise of labor activity to the extent of Federal power under the commerce clause, may be reached under the anti-trust laws (*Local No. 167* v. *United States,* 291 U. S. 293) and under a recent drastic criminal statute (C. 569, 48 Stat. 979; U. S. Code, Title 18, Sec. 420 (a)-(e)).[22]

Petitioner thus invokes "liberty of contract", not in order to be free to carry on the normal operations of its business, but in order to be free to interfere with the recognized liberties of its employees. This contention was swept aside by this Court in the *Texas & New Orleans* case, in these words (281 U. S. at 570):

> Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees,

[22] After careful consideration, Congress determined that the regulation of such practices was beyond the proper scope of this Act. See H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 16, 17; Sen. Rep. No. 573, 74th Cong., 1st Sess., pp. 16, 17. Regulation of such practices was likewise not included in the Railway Labor Act of 1926, upheld in *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, and a suggestion to incorporate them in the amendments of 1934 was rejected. See *Ass'n of Rock Island Employees* v. *Louden*, 15 F. Supp. 176, 183 (D. Kan.), aff'd, 86 F. (2d) 458 (C. C. A. 10th).

instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both.

III

THE NATIONAL LABOR RELATIONS ACT, AS HERE APPLIED TO PETITIONER, DOES NOT CONTRAVENE THE SEVENTH AMENDMENT

Petitioner assigns as error the failure of the court below to hold that the Act violates the Seventh Amendment to the Constitution. Its objection is based upon the provision of the decree which requires, pursuant to Section 10 (c) of the Act, that Watson, the discharged employee, be made whole for any loss of pay which he has suffered by reason of his unlawful discharge (R. 433). We submit that this is merely an incident of the equitable remedy for the prevention of unfair labor practices, and may properly be required without a trial by jury.

The relevant clause of the Seventh Amendment, by its very terms, applies only to "suits at common law"—*i. e.*, rights and remedies as they were generally known and enforced at common law by jury trial. *Shields* v. *Thomas*, 18 How. 253, 262; *Kohl* v. *United States*, 91 U. S. 367, 376–377; *Crowell* v. *Benson*, 285 U. S. 22, 45; *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654.

Manifestly, the prohibitions in this Act against interference by employers with the self-organization of their employees were unknown to the common law. *Pennsylvania Federation* v. *Pennsyl-*

vania R. Co., 267 U. S. 203, 210. Moreover, the primary remedy under the Act against such interference is an order, made by the Board and enforced by the Circuit Court of Appeals, to cease and desist from such practices. Such an order is in the nature of an injunctive decree.

The order for restoration of back pay is merely supplementary to these sanctions—a mere incident in the equitable remedy—included in order to effectuate the policy of the Act and to bring about as complete a restoration of the *status quo* as possible. H. Rep. No. 1147, 74th Cong., 1st Sess., p. 24. A similar order in *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, was held not to have gone beyond the proper enforcement of Section 2, third, of the Railway Labor Act of 1926. 281 U. S. at 571. See 25 F. (2d) 876, 878. The National Labor Relations Act thus is merely a specific authorization of action which courts of equity would normally take even without statutory authority.

Indeed, the cases specifically denying the applicability of the Seventh Amendment go much further than is necessary to sustain the order here in question. Jury trial consistently has been denied in private litigation where recovery of money damages is sought as an incident to equitable relief, and where such damages might have been recoverable independently in an action at law. *Clark* v. *Wooster*, 119 U. S. 232; *Pease* v. *Rathbun-Jones Engineering Co.*, 243 U. S. 273, 279; *Filer & Stowell*

Co. v. *Diamond Iron Works,* 270 Fed. 489 (C. C. A. 7th), certiorari denied, 256 U. S. 691. A jury trial is not required by the Amendment even in suits brought solely for a money judgment, if the claim arises in connection with a broader proceeding in equity (*Barton* v. *Barbour,* 104 U. S. 126, 133; *In re Wood,* 210 U. S. 246, 258), or if the award is "equitable in nature" under a statute which supersedes a common law right and leaves nothing to be tried by a jury (*Mountain Timber Co.* v. *Washington,* 243 U. S. 219, 235; *Rowlette* v. *Rothstein Dental Laboratory,* 63 F. (2d) 150 (App. D. C.), certiorari denied, 289 U. S. 736), or if the procedure is not in the nature of or according to the modes and customs of the common law (*Guthrie National Bank* v. *Guthrie,* 173 U. S. 528, 537). See also Willoughby, *Constitution of the United States,* Vol. 2, p. 1156.

A full discussion of the questions raised with respect to the application of the Seventh Amendment to this Act is contained in the recent decision of the Circuit Court of Appeals for the Fifth Circuit, *Agwilines, Inc.* v. *National Labor Relations Board,* decided December 22, 1936. But see opinion of Wilbur, J., in *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.* (C. C. A. 9th), decided January 11, 1937.

We submit, therefore, that the Seventh Amendment has no application.

IV

THE NATIONAL LABOR RELATIONS ACT AS HERE APPLIED DOES NOT VIOLATE THE GUARANTEE OF FREEDOM OF THE PRESS CONTAINED IN THE FIRST AMENDMENT

Petitioner contends that the application of the Act in this case constitutes a violation of the guarantee of the freedom of the press contained in the First Amendment. Br. pp. 96–102. It is submitted that the contention is without merit.

The guarantee of freedom of the press includes both the prohibition of previous restraints on publication, *Near* v. *Minnesota,* 283 U. S. 697, and "any action of the government by means of which it might prevent * * * free and general discussion of public matters." *Grosjean* v. *American Press Co.,* 297 U. S. 233. Admittedly a statute which lays a special burden on the press or has the intent of limiting either circulation or the free expression of opinion would be unconstitutional. But it has never been held that a valid statute of general applicability becomes invalid when applied to the press. A newspaper publisher does not have a special immunity from the application of general legislation nor a special privilege to destroy the recognized rights and liberties of others. Newspapers cannot claim immunity from laws prohibiting the utterance of libelous or obscene statements, *Robertson* v. *Baldwin,* 165 U. S. 275, 281, or from laws governing contempt of the courts, *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, or from the Anti-Trust Laws, *Indiana*

Farmer's Guide Publishing Co. v. *Prairie Farmer Publishing Co.*, 293 U. S. 268; *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission*, 13 F. (2d) 673 (C. C. A. 8th), or from taxes levied on business generally. *Cf. Grosjean* v. *American Press Co.*, 297 U. S. 233, 250. Particularly in the field of labor disputes has it been recognized that action otherwise unlawful may be restrained though carried on by publication or even speech. *Gompers* v. *Bucks Stove Co.*, 221 U. S. 418, 439; *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 204–205; *Duplex Co.* v. *Deering*, 254 U. S. 443, 478. See also *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 558, 571.

Petitioner does not contend that the National Labor Relations Act discriminates against the press or that it constitutes a device to limit the circulation of opinion under the guise of a regulation of commerce. Cf. *Grosjean* v. *American Press Co.*, *supra*. Indeed, far from interfering with the circulation of opinion, the Act facilitates that circulation by providing preventive measures against its interruption through strikes and other labor disturbances. The statute before the Court is intended to apply to certain aspects of business carried on in interstate commerce. Petitioner falls within its terms because it engages in interstate commerce and not because the commodity with which it deals happens to be news.

Petitioner is accordingly reduced to contending that the Act and the order of the Board violate the guarantee of freedom of the press because a member of a labor organization may be biased in editing the news in favor of labor and petitioner should be free to discharge employees who exhibit such bias. We admit without qualification that petitioner has a privilege, unaffected by this Act, to discharge an employee because he exhibits bias in editing the news. Certainly, the free circulation of opinion would be seriously impaired if the press could not discharge employees who have exhibited bias in news writing.

But neither the Act nor the order here involved constitutes the slightest infringement of petitioner's privilege in this respect. The statute goes no further than the requirement that petitioner refrain from interfering with its employees in their self-organization for collective bargaining, and consequently that petitioner refrain from discharging an employee for the reason that he belongs to a labor organization.

The order of the Board imposes no further restriction on the freedom of petitioner to discharge an employee for bias in editing news than does the Act. Watson, the only employee ordered to be reinstated, was never claimed by petitioner to have been discharged on account of bias. Ostensibly he was discharged "on grounds of his work not being on the basis for which he has shown capability" (R. 430). The Board found that in fact Watson was

discharged because of his activity as a member of a labor organization (*Ibid.*). This finding was affirmed by the court below (R. 440) and is not assigned as error in this Court. There is thus no basis for the contention that either the Act or the order in any way restricts petitioner's freedom to discharge employees for bias in editing news. The Board has made no attempt so to construe the Act and if any such application of the Act were to be made in the future, the guarantees of the First Amendment could be invoked.

Since neither the Act nor the order in any way abridges petitioner's privilege to discharge an employee for actual bias, petitioner's contention that the First Amendment has been violated comes down to this: that employees who belong to labor organizations must be conclusively presumed to be biased in their work, and that any legislation protecting the right of organization of editorial employees of a newspaper is of necessity a violation of the guarantee of freedom of the press. The proposition is obviously unsound. "Impartiality is not a technical conception. It is a state of mind". *United States* v. *Wood,* No. 34, decided Dec. 7, 1936. Petitioner itself has refuted the contention that mere membership in a labor organization constitutes bias on the part of an employee. In its brief, pp. 91–92, it claims that it does not discriminate against employees because of membership in the Newspaper Guild, denies discharging Watson for that reason and avers that other active

Guild members are still in its employ. If all this is true, it is difficult to take seriously petitioner's argument that its business of collecting and distributing news reports will be impaired or destroyed by a prohibition against a deliberate discharge of Watson because of his efforts in connection with the self-organization of the editorial employees for the purposes of collective bargaining.

The statute here under consideration guarantees and gives effective protection to the liberty of employees to organize for purposes of collective bargaining in order to eliminate the causes of industrial disputes which injure and disrupt interstate commerce. It imposes no restraint whatever on the free circulation of news, it does not in any way impede the conceded privilege of a news-gathering agency to discharge its employees for failure to live up to its standards of impartiality, and it cannot be considered in any way as a violation of the guarantee of freedom of the press.

V

THE APPLICATION OF THE ACT TO PERSONS OTHER THAN PETITIONER, AND THE VALIDITY OF PROVISIONS OTHER THAN THOSE INVOKED AGAINST PETITIONER, NEED NOT BE CONSIDERED SINCE PETITIONER HAS NO STANDING TO RAISE SUCH QUESTIONS; IN ANY EVENT, SUCH POSSIBLE APPLICATIONS AND SUCH OTHER PROVISIONS ARE SEPARABLE FROM THOSE HERE IN ISSUE

The order of the Board here in question is based upon two specific unfair labor practices, defined in subsections (1) and (3) of Section 8, and is di-

rected to an employer engaged in interstate and foreign commerce. This is the specific and only application of the Act in issue here. That application, we have argued above, is constitutional.

Petitioner, however, steps outside the facts of the case and contends that even though the order here involved be within the power of Congress, that order must be set aside and the statute held invalid *in toto* because (1) the Act applies to all industry and all employees and is not limited to the scope of the federal commerce power (Br. pp. 18–36), and because (2) liberty of contract is violated by certain provisions not directly involved here, notably Section 8 (5), making it an unfair labor practice for an employer to refuse to bargain collectively with his employees, subject to the provisions of Section 9 (a), making representatives selected by the majority of the employees the exclusive representatives for collective bargaining purposes (Br. pp. 82–89). We contend, first, that petitioner has no standing to assert the Act's unconstitutionality in particulars, or in its application to persons and situations, other than those directly here in issue, and second, even if petitioner may raise these questions, the validity of those provisions and applications is not material in the present case because of their separability.

A. *The Constitutionality of the Act's Application to Classes of Persons Other Than Petitioner and the Constitutionality of Provisions of the Act Not Sought To Be Applied to Petitioner Are Matters of Which Petitioner May Not Complain*

It is a salutary and long established principle that no question of constitutional law will be adjudged "in advance of the necessity of deciding it." *Wilshire Oil Co.* v. *United States,* 295 U. S. 100; *Abrams* v. *Van Schaick,* 293 U. S. 188. For this reason, the Court has stated, on numerous occasions, that one who seeks to strike down a statute, state or federal, must show "that he is within the class of persons with respect to whom the statute is unconstitutional and that the alleged unconstitutional feature injures him." *Heald* v. *District of Columbia,* 259 U. S. 114, 123. Or, as the Court said in *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 289: "a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage." See also *Premier-Pabst Sales Co.* v. *Grosscup,* 298 U. S. 226; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 324–325; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 186; *Dillingham* v. *McLaughlin,* 264 U. S. 370, 374; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, 43; *Rindge* v. *Los Angeles County,* 262 U. S. 700, 709; *Hatch* v. *Reardan,* 204 U. S. 152, 160; *Tyler* v. *Judges,* 179 U. S. 405.

Since Section 8 (5) is not in any way a basis for the present action of the Board, petitioner cannot show that "the alleged unconstitutional feature injures" it and therefore cannot attack this provision. And since petitioner is not within any "class of persons with respect to whom the statute is unconstitutional", it may not complain of the Act's application to others. Petitioner, therefore, lacks the requisite standing to ask for an adjudication of the Act's validity in the respects here urged. Such a decision is wholly unnecessary to a determination of the issues here involved. We submit that contentions going beyond the circumstances of the case at bar should be disregarded.

B. *In Any Event, the Applications or Provisions of the Act to Which Petitioner Objects Are Clearly Separable*

Although the constitutional validity of the applications or provisions to which petitioner objects are not in issue, their validity *vel non* is immaterial, for they are separable from the other provisions or applications which, under petitioner's hypothesis, must be assumed to be valid.

1. *The Scope of the Act*

It is difficult to understand petitioner's contention that the Act applies to all industry and all employees. The Act is, in terms, limited to the prevention of unfair labor practices "affecting commerce" (Section 10 (a)), that is, "in commerce, or

burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce" (Section 2 (7)). And the definition of "commerce" as "trade, traffic, commerce, transportation, or communication among the several states" (Section 2 (6)), is manifestly based upon the decisions of this Court defining the scope of the commerce power. With jurisdiction so carefully delimited, it is obvious that the Act does not apply to all employers and employees. See Brief for the Board in No. 419, *Jones & Laughlin Steel Corp.* v. *National Labor Relations Board*, pp. 33–40. Moreover, the Act has no automatic or specific application to any particular employer or employees, or classes thereof. The jurisdictional requirements of subsections (6) and (7) of Section 2 must always be met, and the Board's findings with respect thereto are subject to full review in the circuit courts of appeals and ultimately in this Court. Should the Board err in its application of the Act, the courts will correct the error by holding that the order exceeded the Act, not that the Act exceeded the commerce power.[53] In the matter of its jurisdiction, there-

[53] In all but one of the cases in the circuit courts of appeals in which enforcement of the Act has been denied, this construction of the Act has been the basis of the decision. *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co., Inc.*, 85 F. (2d) 1 (C. C. A. 2d), Nos. 422, 423, October Term, 1936; *Foster Bros. Mfg. Co.* v. *National Labor Relations Board*, 85 F. (2d) 984 (C. C. A. 4th); *National*

fore, the Act is like the anti-trust statutes—particularly the Federal Trade Commission Act—which in terms apply neither to industry generally nor to any particular enterprise or class thereof.

Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 83 F. (2d) 998 (C. C. A. 5th), No. 419, October Term, 1936; *Fruehauf Trailer Co.* v. *National Labor Relations Board*, 85 F. (2d) 391 (C. C. A. 6th), Nos. 420, 421, October Term, 1936. In *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.* (C. C. A. 9th), decided January 11, 1937, one judge held the Act unconstitutional in part under the Fifth Amendment, although stating that he considered it an otherwise valid regulation of commerce as applied to that respondent; another judge concurred on the merits without passing on the constitutionality of the Act; and the third judge, dissenting, held the Act constitutional.

In other cases, three of the circuit courts of appeals mentioned in the preceding note, including the court below, have held that the Act is constitutional and has an area of valid application under the commerce clause. *National Labor Relations Board* v. *National N. Y. Packing Co.*, 86 F. (2d) 98 (C. C. A. 2d); *Washington, Virginia and Maryland Coach Company* v. *National Labor Relations Board*, 85 F. (2d) 990 (C. C. A. 4th), No. 469, October Term, 1936; *Bradley Lumber Company* v. *National Labor Relations Board*, 84 F. (2d) 97, 99 (C. C. A. 5th), certiorari denied, No. 153, Oct. 12, 1936; *Agwilines, Inc.*, v. *National Labor Relations Board*, decided Dec. 22, 1936 (C. C. A. 5th). See also, *National Labor Relations Board* v. *New England Transportation Co.*, 14 F. Supp. 497 (D. Conn.); *S. Buchsbaum & Co.* v. *Beman*, 14 F. Supp. 444, 447–8 (N. D. Ill.); *Precision Castings Co.* v. *Boland*, 13 F. Supp. 877, 885 (W. D. N. Y.), aff'd, 85 F. (2d) 15 (C. C. A. 2d); *Heller Bros. Co.* v. *Lind*, decided April 2, 1936 (Sup. Ct. D. C.), aff'd, Nov. 9, 1936 (App. D. C.); *Associated Press* v. *Herrick*, 13 F. Supp. 897, 898 (S. D. N. Y.).

It has always been recognized that Congress by this Act intended to remain within the limits of its power under the commerce clause, as judicially delimited. The report of the Senate committee states that the Act "does not intend to go beyond the constitutional power of Congress, as that power may be marked out by the Courts." Sen. Rep. No. 573, 74th Cong., 1st Sess., p. 19. The report of the House committee is substantially to the same effect. H. Rep. No. 1147, 74th Cong., 1st Sess., p. 10. See also 79 Cong. Rec. pp. 7572, 9698. And the Act was so understood by the Chief Executive at the time he approved it. "This Act * * * must not be misinterpreted * * *. It does not cover all industry and labor, but is applicable only when violation of the legal right of independent self-organization would burden or obstruct commerce." *Statement of the President on Approving the National Labor Relations Act*, July 5, 1935.[54] Indeed, any inference to the contrary[55] must be rejected under the principle that

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[54] *First Annual Report of the National Labor Relations Board* (1936) p. 9.

[55] Petitioner cannot avoid the basic jurisdictional provisions of subsections (6) and (7) of Section 2 by efforts to draw contrary inferences from the definitions of "employer" and "employee" contained in subsections (2) and (3) of Section 2. Br. p. 25. Those definitions have no bearing upon the jurisdiction of the Board, which is determined by subsections (6) and (7). See H. Rep. No. 1147, 74th Cong., 1st Sess., p. 10; Sen. Rep. No. 573, 74 Cong., 1st Sess., p. 7. This is a wholly reasonable and not unusual method of drafting a federal law. Moreover, to have utilized subsections

the Act should not be given a broad construction if its validity can be sustained by a narrow and reasonable one. *Sproles* v. *Binford,* 286 U. S. 374, 392; *Crowell* v. *Benson,* 285 U. S. 22, 62; *United States* v. *Chicago, Milwaukee, St. Paul and Pacific R. R. Co.,* 282 U. S. 311, 326; *Federal Trade Commission* v. *American Tobacco Company,* 264 U. S. 298, 307; *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 401. See also *Arizona* v. *California,* 283 U. S. 423, 456; *Stephenson* v. *Binford,* 287 U. S. 251, 276. It is immaterial, therefore, that some of the proponents of the Act in Congress, or even that Congress itself hoped that the Act would have a broader application than is determined by this Court to be valid under the commerce clause. *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658, 668–669; *United States* v. *New York Central R. R. Co.,* 263 U. S. 603, 610–611.

Finally, it cannot be urged that the Act, which is thus limited, is invalid in that it has, in practice, been applied to all industry. The argument is based upon a complete misapprehension of the facts, for the Board, in its consideration of specific cases as well as in its administration of the Act generally, has recognized throughout that the requirements of subsections (6) and (7) of Section 2 must be satisfied, and has never assumed that the

(2) and (3) for jurisdictional purposes might have resulted in unduly restricting the Act's application in the District of Columbia and the Territories. Cf. *El Paso & N. E. Ry.* v. *Gutierres,* 215 U. S. 87, 93–94.

Act was one of general application. In numerous cases the Board has refused to entertain charges which it considered to be beyond its jurisdiction, and in several cases a complaint has been issued and subsequently dismissed by the Board for lack of jurisdiction on the basis of the facts disclosed at the hearing.[44] In many of the cases which come

[44] This question is discussed in detail in the First Annual Report of the National Labor Relations Board (1936) pp. 135–137. The report cites Section 2 (6) and 2 (7) of the Act, and concludes from these provisions "that the Act was not intended to apply to all industry or labor, but rather that the Board's jurisdiction is co-extensive with Congressional power to legislate under the commerce clause of the Constitution (apart from the District of Columbia and the Territories, where Congressional power is plenary)." (p. 135.) After discussing various classes of cases to which the Act may or may not be applied, the Report states: "To October 1, 1936, there were 1,551 charges and petitions brought to the attention of the Board. 1,059 of these cases had been closed on October 1, in the following manner: 498 were closed by agreement of both parties. 153 cases were dismissed by the Board and the regional directors before the issuance of a formal complaint. 343 cases were withdrawn by the parties filing them with the Board before formal action was taken by the Board. Of the 153 cases dismissed by the Board and the regional directors at least 71 were dismissed without formal action because the regional directors did not consider that the unfair labor practices affected commerce within the meaning of the act. Many of the 343 cases withdrawn before formal action by the Board were withdrawn because of advice by the regional directors that the Board would not take jurisdiction for the same reason. It is at this stage, and before formal complaint is issued, that the great elimination of cases occurs for lack of jurisdiction; nevertheless the minutes of the Board at Washington show that in executive meeting the Board itself had occasion to refuse to issue com-

before the Board, such as those involving an employer and employees engaged in interstate commerce, and those involving enterprises within the territories and the District of Columbia, it can scarcely be urged that the application of the Act is in excess of the power of Congress. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548; *El Paso & N. E. Ry.* v. *Gutierrez*, 215 U. S. 87. As to other cases, the question may be debatable, but may safely be left to the Board and to the courts for decision under the statutory procedure on the respective administrative records, as in the case of orders issued by the Federal Trade Commission. The Court, like the Board, is concerned here only with the application to this respondent. *Ashwander* v. *Valley Authority*, 297 U. S. 288, 324; *Premier-Pabst Sales Co.* v. *Grosscup*, 298 U. S. 226.

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plaints in six cases, and directed regional directors to seek withdrawals in six other cases, because of such lack of jurisdiction. In four cases trial examiners, after hearing, dismissed complaints for lack of jurisdiction and the cases were closed. The employees affected accepted the trial examiner's ruling that commerce was not affected within the meaning of the act.

"Neither the regional directors nor the Board issue complaints without a rather full investigation of the facts bearing upon the commerce issue.

"The ultimate decision on questions of constitutional and statutory jurisdiction under this act is for the courts in each case as it arises. Decisions by the Supreme Court in a number of test cases now pending will shed light on the valid scope and application of the act, and serve as authoritative guides for the Board in its administration" (pp. 136–137).

We submit, therefore, that it cannot be urged that the statute is unconstitutional as applicable on its face to matters that are within and matters that are without the power of Congress, as in the *Trade Mark Cases,* 100 U. S. 82, the *Employers' Liability Cases,* 207 U. S. 463, and *United States* v. *Reese,* 92 U. S. 214. Here the Act is limited in its terms, by appropriate language, only to those matters over which Congress has control, which was not true of the general and indivisible language of the statutes involved in the above cases. Should an order of the Board be held inapplicable under the commerce power to some situations, no rewriting or interpolation of limiting words would be required in any respect. The substantive and procedural provisions of the Act would remain intact. Thus the Act, in any event, would operate as written in such important fields as interstate water transportation, radio broadcasting, telephone and telegraph communication, pipe lines, motor transportation, and the like, as well as in the District of Columbia and the territories. Moreover, this was the intent of Congress. Section 15 specifically declares that the invalidity of the "application" of the Act "to any person or circumstance" should not render the Act invalid with respect "to persons or circumstances other than those as to which it is held invalid."

2. *The Separability of Alleged Invalid Provisions*

In considering the separability of alleged invalid provisions of a statute, the test is whether the constitutional provisions, standing alone, "can be given legal effect", and whether "the legislature intended the unobjectionable provision to stand in case other provisions held bad should fall." *Lynch* v. *United States,* 292 U. S. 571, 586; see also *Dorchy* v. *Kansas,* 264 U. S. 286, 290. "The point is * * * whether they are essentially and inseparably connected in substance—whether the provisions are so interdependent that one cannot operate without the other." *Loeb* v. *Columbia Township Trustees,* 179 U. S. 472, 490; *Berea College* v. *Kentucky,* 211 U. S. 45, 55–56. See also *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 312–313.

The fifth unfair labor practice, dealing with refusal to bargain collectively with the representatives designated by a majority of employees in the appropriate unit, is not so "inseparably connected" with the first four that the latter could not "operate without" Section 8 (5). We of course contend, for reasons similar to those set forth in the Government's brief as *amicus curiae* in No. 324, *Virginian Ry. Co.* v. *System Federation No. 40,* that Section 8 (5) is a valid regulation of commerce and does not deny due process. But if Section 8 (5) were, for any reason, held unenforceable, it would not be necessary to make any amendments to the sections prescribing the unfair labor practices involved in the case at bar, or to any of the

procedural provisions. All that Congress could do in such a case, if it set about actually to amend the statute to conform with the decision, would be to strike subsection (5) from the Act.

Complete support for this position is found in the decision in *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548. There the Court was concerned solely with those provisions of the Railway Labor Act which prohibited interference with employees in their self-organization and choice of representatives, the issues raised in the instant case. The Railway Labor Act then, as now, contained a provision requiring the carriers to exert every reasonable effort to make and maintain agreements with the representatives of their employees (Sec. 2, first; U. S. C., Title 49, Sec. 152, first subdivision), the essence of the allegedly invalid subsection (5) of the present Act. The Court did not decide whether this general declaration of the duty of carriers and employees to make reasonable efforts to enter into agreements was of imperfect obligation. But the Court had no hesitation in upholding as a valid regulation under the commerce clause the definite prohibitions against interferences with the employees in their free choice of representatives. It is plain, therefore, that subsections (1) and (3) of the present Act can operate as intended and be given full legal effect regardless of subsection (5).

The remaining question is whether Congress intended that the first four specific unfair labor

practices should fall if the fifth should be declared unenforceable. Congress, we submit, expressed itself adequately upon this matter in the separability provision contained in Section 15. While this provision is not an "inexorable command", it "clearly evidences the intention of the Congress not only that an express provision found to be unconstitutional should be disregarded without disturbing the remainder of the statute, but also that any implication from the terms of the Act which would render them invalid should not be indulged." *Crowell* v. *Benson,* 285 U. S. 22, 63; see also *Champlin Refining Co.* v. *Commission,* 286 U. S. 210, 234–235; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 184–185.

The presumption of separability evidenced by this section is buttressed by other considerations. The various unfair labor practices are listed separately in the Act. It is the obvious intention that they be applied and enforced separately, as has been done in this case. There is no requirement in the Act that petitioner or any employer be found to have engaged in all the listed unfair labor practices; the prevention of *each* of them is but a *different method* of protecting rights guaranteed by Section 7.

The contention that Congress would not have enacted the law if subsection (5) were invalidated disregards the fact that interference with self-organization and choice of representatives is in itself an important cause of industrial strife

which Congress could remove or prevent. Moreover, the incorporation in subsection (5) of an express duty on the employer to bargain collectively with the representatives of the majority of employees in the appropriate unit is not the exclusive or essential method of protecting the exercise by employees of the right of collective bargaining. On the contrary, that right is effectively fostered through subsections (1) and (3) of Section 8, by protecting employees against interference and restraint in its exercise and by safeguarding the rights of self-organization and free choice of representatives. This conclusion is confirmed by experience (*supra*, pp. 45 *et seq.*), and is the very basis of the principles declared in the *Texas & New Orleans* case. The Court there said that employees had the right to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work, and that the prohibition against interference with choice of representatives was based upon a recognition of the right of collective bargaining and prevented its exercise from being reduced to a mockery. 281 U. S. at p. 570. The omission of subsection (5) thus would not have deprived employees of essential protection in collective bargaining or otherwise have seriously impaired the policies of the Act. It seems clear that Congress, if faced with a choice, would have enacted the statute without subdivision (5), which is but an additional means of accom-

plishing one of the purposes of the Act—to protect the right of collective bargaining. Petitioner's argument comes to this: that self-organization, freedom in choice of representatives, and collective bargaining may not be protected and furthered unless collective bargaining, with majority rule, is made compulsory. Obviously, this position is untenable, and cannot be imputed to Congress.

Cases like *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, and *Wolff Packing Co.* v. *Kansas Industrial Court*, 262 U. S. 522, are not controlling here. The statutes there involved had, as their foundations, the pooling system of reserves and compulsory arbitration, respectively. The decision in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, holding inseparable the labor and price provisions of the Bituminous Coal Conservation Act, is likewise not in point. There the Court found that the price and wage provisions were "so woven together as to render the probability plain enough that uniform prices, in the opinion of Congress, could not be fairly fixed or effectively regulated, without also regulating these elements of labor which enter so largely into the cost of production" (p. 315). The present case, on the other hand, involves the validity of particular provisions which, as we have fully shown above, are independent of the provisions claimed to be invalid. It is controlled, therefore, by such rulings on separability as *Champlin Refining Co.* v. *Commission*,

286 U. S. 210, 234–235, and *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 184–185.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted.

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APPENDIX

THE NATIONAL LABOR RELATIONS ACT (ACT OF JULY 5, 1935, C. 372, 49 STAT. 449; U. S. C. SUP. I, TITLE 29, SEC. 151 ET SEQ.)

AN ACT To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the pur-

pose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board created by section 3 of this Act.

(11) The term "old Board" means the National Labor Relations Board established by Executive

Order Numbered 6763 of the President on June 29, 1934, pursuant to Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), and reestablished and continued by Executive Order Numbered 7074 of the President of June 15, 1935, pursuant to Title I of the National Industrial Recovery Act (48 Stat. 195) as amended and continued by Senate Joint Resolution 133[1] approved June 14, 1935.

NATIONAL LABOR RELATIONS BOARD

SEC. 3. (a) There is hereby created a board, to be known as the "National Labor Relations Board" (hereinafter referred to as the "Board"), which shall be composed of three members, who shall be appointed by the President, by and with the advice and consent of the Senate. One of the original members shall be appointed for a term of one year, one for a term of three years, and one for a term of five years, but their successors shall be appointed for terms of five years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum. The

[1] So in original.

Board shall have an official seal which shall be judicially noticed.

(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

SEC. 4. (a) Each member of the Board shall receive a salary of $10,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint, without regard for the provisions of the civil-service laws but subject to the Classification Act of 1923, as amended, an executive secretary, and such attorneys, examiners, and regional directors, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation (or for statistical work), where such service may be obtained from the Department of Labor.

(b) Upon the appointment of the three original members of the Board and the designation of its chairman, the old Board shall cease to exist. All employees of the old Board shall be transferred to and become employees of the Board with salaries under the Classification Act of 1923, as amended, without acquiring by such transfer a permanent or civil service status. All records, papers, and property of the old Board shall become records, papers, and property of the Board, and all unexpended funds and appropriations for the use and maintenance of the old Board shall become funds and appropriations available to be expended by the Board in the exercise of the powers, authority, and duties conferred on it by this Act.

(c) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

SEC. 6. (a) The Board shall have authority from time to time to make, amend, and rescind such rules

and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with

a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain [1] such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other

[1] So in original.

means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor

practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the

pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonble grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the

court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board

as to the facts, if supported by evidence, shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U S. C., Supp. VII, title 29, secs. 101–115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that re-

lates to any matter under investigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any District Court of the United States or the United States courts of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be

prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records,

papers, and information in their possession relating to any matter before the Board.

SEC. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

LIMITATIONS

SEC. 13. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

SEC. 14. Wherever the application of the provisions of section 7 (a) of the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, sec. 707 (a)), as amended from time to time, or of section 77 B, paragraphs (l) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" (48 Stat. 922, pars. (l) and (m)), as amended from time to time, or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

SEC. 15. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons

or circumstances other than those as to which it is held invalid, shall not be affected thereby.

SEC. 16. This Act may be cited as the "National Labor Relations Act."

Approved, July 5, 1935.

Major issues involved in labor disputes beginning in each year from 1919 to June 1936

Year	Total	Wages and hours		Organization [1]		Miscellaneous [2]	
		Number of disputes	Percent of total	Number of disputes	Percent of total	Number of disputes	Percent of total
1919	3,[illegible]	2,[illegible]	56	874	26	720	20
1920	3,[illegible]	2,[illegible]	60	652	19	721	21
1921	2,[illegible]	1,[illegible]	62	600	17	684	20
1922	1,[illegible]	[illegible]	33	336	21	303	27
1923	1,[illegible]	721	46	315	20	517	34
1924	1,340	577	43	382	29	400	37
1925	1,[illegible]	527	41	223	17	541	42
1926	1,[illegible]	475	46	222	21	335	33
1927	794	380	48	234	30	180	21
1928	639	306	48	190	30	133	21
1929	900	414	46	313	34	177	20
1930	683	317	46	219	33	117	18
1931	894	504	56	255	29	135	15
1932	808	534	66	173	21	102	13
1933	1,[illegible]	985	60	447	29	180	11
1934	1,856	727	39	853	46	276	15
1935	2,014	709	35	923	47	283	15
1936 (Jan.–June)	963	348	36	462	48.5	147	15.5

[1] Includes interference with employee organization, discrimination, etc.
[2] Includes sympathy, jurisdiction, etc.

Compiled from statistics published by the U. S. Bureau of Labor Statistics in Monthly Labor Review (July 1934), table 9, p. 78; (May 1933), p. 1267; (January 1935) table A, p. 162; May (1936), table 6, p. 1396; and Monthly Labor Reviews for May–Oct. 1936, Monthly Reports on Industrial Disputes. Data for 1934–1936 are not strictly comparable to that of previous years. Beginning in November 1934, the Bureau of Labor Statistics introduced more accurate and complete methods of compiling the statistics. See *Monthly Labor Review* (January 1935) p. 1.

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